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ARGUED AND DETERMINED IN THE *op. cit.*

SUPREME COURT OF APPEALS

—OF—

WEST VIRGINIA

At the Fall-Special Term of 1882, and the January
and Spring-Special Terms of 1883.

—BY—

CORNELIUS C. WATTS,

ATTORNEY-GENERAL AND EX OFFICIO REPORTER.

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JUDGES

OF THE

SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

OKEY JOHNSON, PRESIDENT.

*ALPHEUS F. HAYMOND.

THOMAS C. GREEN.

ADAM C. SNYDER.

†SAMUEL WOODS.

ATTORNEY-GENERAL AND EX OFFICIO REPORTER,

CORNELIUS C. WATTS.

CLERK,

O. S. LONG.

*Resigned January 1, 1883.

†Appointed January 1, 1883.

MEMORANDA.

RESIGNATION OF JUDGE ALPHEUS F. HAYMOND.

At the close of the Fall-Special term, 1882, Judge Haymond resigned his commission; and on the last day of the term, December 16, 1882, Daniel Lamb Esq. on behalf of the members of the bar of Ohio county, after speaking earnestly of the valuable services rendered to the legal profession and to the people of the State by the Judge now about to retire and expressing, in impressive manner, the good wishes that follow Judge Haymond in his retirement and in whatever sphere of duty he may be called to act, presented the following

RESOLUTIONS :

At a meeting of the members of the bar of Ohio county, held in Wheeling on the 2d day of December, 1882, the following resolutions were adopted :

Resolved, That the members of this bar have learned with deep regret, that Judge Haymond has determined to retire from the labors and duties of the bench which he has for many years adorned.

Resolved, That it gives this bar pleasure to express their sentiments of sincere respect for Judge Haymond, which have been inspired by the capacity, the accurate learning, the patient and persistent investigation, the anxious desire to do justice, and the courtesy he has uniformly accorded to the members of the bar, which have distinguished him throughout his long period of service on the bench of the Supreme Court of Appeals.

Resolved. That the committee by whom these resolutions have been reported be requested to present them to the Court and ask that they be entered on the minutes.

For the Court President Johnson spoke as follows :

Gentlemen of the Bar :

The cordiality with which you express in your resolutions the high esteem, in which you hold the judge, who to-day occupies a seat here for the last time, is very highly appreciated by the Court. Your expression of the fact, that you have always received courteous treatment from our associate, reminds us of the fact, that as a Court and as individuals we have never had occasion to complain of the bearing of the bar towards us. In the decision of every legal controversy, one side or the other must suffer defeat, but we cannot call to mind a single instance of anything but manly bearing on the part of the members of the bar, when the decision of the Court was adverse to their clients. The practice of law is among the noblest of the learned professions ; and there is more forbearance and consideration for each others rights, and more real courtesy among lawyers than can be found among the members of any other of these professions. The members of your profession have fought more hard battles and won more victories for the amelioration of mankind than any other body of men in the world. No great scheme for the good of humanity, no grand revolution for the betterment of government was ever set on foot, and prosecuted to a successful termination, that did not have as its greatest power the heart and brain of the lawyers. From your ranks must come the man to fill the vacancy now made on this bench. And we know you so well, that much as we appreciate our associate, much as we regret to lose his untiring energy, his correct thought, his close and intense application, his matured reasoning powers, his honest conviction of duty, his fearless administration of justice, and his ability at his desk and in the consultation room, we trust you to give us a successor worthy to wear the ermine he now lays aside. This is saying much, for Judge Haymond is worthy of all the praise you have given him. At a great personal sacrifice for ten years he has occupied a seat, upon this bench during four years of which time he was the president of the Court, and has helped to build up a system of jurisprudence for our young State, of which we believe no State would be ashamed. While here it has fallen to him to prepare a number of opinions involving abstruse questions of

constitutional law, which decisions do great credit to him and to the bench of which he was a member. His opinions will be found in fifteen volumes of our reports; and they will stand as the best recommendation he can have. No man can say, that he ever faltered in the discharge of his duty. He was as fearless as he was profound, as cautious as he was learned, and in every department of his work he knew no friends or foes, but with honest intent meted out stern and inflexible justice to all alike without regard to consequences. A desire to make suitable provision for those dependent upon him, which he could not accomplish with the meager salary paid, compels him to quit the bench and return to the bar. With perfect confidence gentlemen that you will deal kindly with him, we resign him into your hands.

And now Judge Haymond what shall I say in parting? To the bar you are judge, to us you are more, you are a brother dearly beloved. The bar cannot know the tender ties, that bind us together. Since we have been associated, death, cruel, relentless death, has strck down those near to us. We have not only toiled together but we have sympathized with each other as members of one family. Few know the closness and intimacy of personal relationship which must exist between the judges of this Court. When you return to the bar I know you will often think of us; and because you know the labors of the position, in you we will always have a sympathetic friend. You know that our kindest wishes go with you; and wherever you are, and whatever you do, be assured you shall always be remembered by us. Farewell.

In response, Judge Haymond speaking from the floor of the court-room, said:

Mr. President and Gentlemen of the Bar of Ohio County:

My own wish and inclination was to remain silent during these proceedings of the court and the Ohio county bar, but by the suggestion of one of my brethren, I have been induced to arise and say something in reference to what has been so kindly said of me and my official conduct and labors during the period I have been a member of the Supreme Court of Appeals of this State. Considering that the members of the Ohio county bar are numerous, and learned and able in their profession, and that more than half of my official labors have been performed under their immediate cognizance and observation, I can but regard the resolutions of the bar of Ohio county, and

the sentiments and views therein expressed, of my official labors and acts, as a great honor, for which I express and return to them my thanks and gratitude.

Mr. President, I thank you and my other brethren of the bench for the good and kind words you have just expressed, for yourself and them, concerning me and my official conduct and action while I have been a member of the Court. It is consoling, indeed, to me to know and feel that in voluntarily retiring from the honored and responsible position of a judge of the Supreme Court of Appeals of this State, I carry with me, into private life, the respect and kindly feelings of my brethren of the bench, and of the members of the Ohio county bar. Mr. President, the reflection that the long, close and pleasant official intercourse which I have so much enjoyed with my brethren of the bench during our official labors, is now about to be severed forever makes me feel painfully sad. Our official labors, intercourse on the bench, in the consultation room, and elsewhere, have universally been characterized by a warm, unruffled and continued friendship. And the pleasure of our official intercourse in the discharge of our great official duties will be pleasantly remembered and cherished by me during life whatever may be my future career or destiny. I shall not speak of my official labors or their merits, I leave them, so far as they are, and are yet to be, officially published and reported, to speak for themselves for the present and for the future. True a great part of these labors do not, and cannot, appear in the published reports of decisions, but it is not for me to speak of their extent or efficacy. Of my official labors, their extent and usefulness to the public, others may and doubtless will, speak more or less in approval or disapproval. Modesty forbids that I should say more in my own behalf than that I have sought to do my duty.

The Constitutional amendment of 1880, adopted in lieu of the eighth article of the Constitution of 1872, has, as one of its effects, added materially, and as I believe will still add, to the labors of the Supreme Court of Appeals. Since the year of its adoption the number of appeals, writs of error, etc., allowed have increased nearly one third over that year. In view of this increase of cases in the Court, present and anticipated, I fear the Court, with the exercise of the greatest diligence and industry, its respective members may be able to exert, will not be able to keep up with its business, or dispose of the causes before it as speedily as may be desired. But in

retiring from the Court, with no motive or interest in view other than the public's best and greatest interests, I hope my brethren of the bench will excuse me for presuming to give utterance to a few words by way of friendly parting request or advice in relation to this subject, as I believe, and intend, in the interest of the Court and the public, and that is: No matter how great the increase of your docket, elaborate and consider well the principles of law and equity involved in each case upon which you are required to pass, even though it requires the consumption of much time and labor to be able to perceive and determine upon those principles of law and equity involved which are correct. The public interest and welfare is involved to a great extent in the correctness of the principles of law and equity which you announce and establish by your decisions. Upon their wisdom and justice depends, to a great extent, the security of the lives, liberty and property of the citizens. The public expect, and the public interests demand, that the principles of law and equity declared and established by you in every case shall be correct as nearly as may be. And the intelligent public equally expect, and demand, that you shall devote such a reasonable amount of time to the investigation and consideration of each case, and the principles involved therein, as is necessary to accomplish this desirable end as nearly as may be expected by human judgment with the aid of the lights and means at command. The public is more deeply interested in the correctness of the principles of law and equity which you establish by your decisions in each case you decide, than the number of cases which you decide in a given time. The establishment of correct, just and wise principles of law and equity, and the making of correct and just decisions in each case should be the paramount object of the Court of last resort. To accomplish this great object the proper and necessary time must be devoted to each case, even though it cause delay in the decision of other cases. Hasty and ill-considered decisions are unprofitable to the public, unreliable as precedents and authority for the legal profession, or the citizen, and discreditable to the Court that makes them. If therefore the cases increase upon your docket so that you cannot decide and dispose of them as speedily as desirable without hasty, ill-considered decisions thereof, it will be much better for the public that cases should accumulate upon your docket, and encounter delay in decision, than that you should fail in the

performance of your duty in the manner before indicated. If the business in the Court increases from any cause, so that by doing your duty to the public, and parties litigant in each case you decide, you are unable to decide other cases on your docket in a reasonable time and the business accumulates, and delay in the decision of such other causes follows, this unavoidable delay may be provided for and remedied to a great extent by the people by law, Constitutional or statutory, or both, as is customary in other States under such circumstances. But if you make hasty decisions and thereby announce and establish therein incorrect and unwise principles of law or equity, great injury and wrong is thereby done to the public, as well as to litigants, for which there is often no complete remedy and none can be provided. No matter how well and faithfully you discharge your official duties, if your work increases upon your hands there will doubtless be clamor against the Court from some sources for delay in the decision of causes. But while it is expected that you will continue to be diligent, energetic and laborious in the discharge of your official duties, I invoke you, in the highest interests of the State, and of the people, as well as the reputation of the Court as a high judicial tribunal, not to suffer or permit yourselves to be led or driven by clamor, or otherwise, for any reason, into the rendering of hasty and ill-considered decisions, no matter from what source or quarter that clamor may come. If you are led into making such decisions, your reported decisions will soon be in conflict and confusion, and will properly cease to be regarded with respect, or as reliable authority. I now again thank the Court, and the members of the Ohio county bar, for their kind and good words declared on this occasion in relation to myself and my official conduct and labors, and I bid each and all an affectionate "Good by."

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REPORTS OF THE DECISIONS
OF THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA.

FALL-SPECIAL TERM, 1882.*

WHEELING.

HOGG, ADM'R, v. VINTROUX *et al.*

Submitted August 14, 1882—Decided November 25, 1882.

1. In a suit on the bond of an administrator against the principal and sureties therein, the bar of the statute of limitations, as to such sureties, is ten years from the return day of an execution issued on the plaintiff's claim; or ten years from the time the administrator shall have been ordered by a court acting upon his account, to pay such claim. (p. 10.)
2. Where a non-negotiable note or bond is given by a debtor to his creditor for an existing debt, such bond or note is *prima facie* not a conditional payment but collateral security for such debt; though it may be shown, by either direct or circumstantial evidence to have been intended by the parties to be an absolute or conditional payment. If such bond or note was received as collateral security, though it be made payable at a future time, unless there was an agreement to postpone the right of action on the original debt proven by other evidence direct or circumstantial, the taking of such collateral security does not suspend the right of action on the original debt, and therefore does not release the sureties from their liability. *Sayre v. King*, 17 W. Va. 562. (p. 10.)

*The other cases determined at this term were reported in volume xx.

91	1
42	584
21	1
51	577
21	1
65	139

3. An administrator as such, being indebted to an insane distributee, offers to give to the committee of such distributee his bond for such indebtedness, and the committee accepts such offer and the administrator executes to the committee his bond and the latter gives him a receipt, reciting therein that *the note* of the administrator has been received for the amount of such indebtedness and the administrator, in a subsequent, *ex parte*, settlement of his administration accounts, is credited with the said amount, but said bond is never paid and the administrator, having died and his estate found to be insolvent, such bond will not be held to be a payment of said indebtedness and the sureties on the administration bond will be made liable therefor to the representatives of such distributee. (p. 11.)
4. A case in which the decree of the circuit court is reversed for want of proper parties to the suit, and because the rights and liabilities of the parties were not properly ascertained and adjusted in the suit or by said decree.

Appeal from and *supersedeas* to a decree of the circuit court of the county of Putnam rendered on the 6th day of May, 1880, in a cause in said court then pending, wherein James W. Hoge, administrator, was plaintiff, and O. L. Vintroux, executrix, and others were defendants, allowed upon the petition of said defendants.

Hon. Joseph Smith, judge of the seventh judicial circuit, rendered the decree appealed from.

The facts of the case fully appear in the opinion of the Court.

John W. English for appellant cited the following authorities: 3 Rob. Pr. (new) p. 65, 265, 266; 6 Mass. 58; 5 Mass. 299; 1 Wash. 199; 3 W. Va. 285; 11 Mass. 26; 17 W. Va. 135; Code of Va. (1849) p. 394 § 45; 17 W. Va. 562; 25 Gratt. 211; 2 Wall. 235; 32 Gratt. 1; White & Tudor Lead. Cas. Eq. Pt. II. vol. 2 p. 378; 5 Ire. Eq. 91; 7 Hill 250; 3 Den. 512; 2 Whart. 253.

Smith & Knight for appellee cited the following authorities: Code ch. 136 § 4; 7 W. Va. 63; Code ch. 104 § 6, 16; 10 W. Va. 220; 36 Am. Rep. 261; 26 Am. Dec. 166; 4 McLean 120; 9 Gratt. 252; 17 W. Va. 562.

SNYDER, JUDGE, announced the opinion of the Court:

This suit was brought in the circuit court of Putnam county, on the 5th day of October, 1868, by James W. Hogg, administrator of Mary Staton, deceased, to surcharge and falsify the accounts of Lewis E. Vintroux as administrator of James Staton, deceased, and to recover from said Vintroux's executrix and his sureties on his official bond as such administrator, a large sum alleged to be due to the estate of said Mary Staton as the widow of said James Staton. Olivia L. Vintroux as executrix of L. E. Vintroux, deceased, Robert M. Hall, John Bowyer, Robert T. Harvey and L. J. Timms as administrator of Allen Sebrell, deceased, were made defendants to the bill. During the pendency of the suit said John Bowyer died and J. T. Bowyer and J. B. Dudding, his executors, were made parties defendants as such executors. All the defendants except L. J. Timms, administrator &c., demurred to the plaintiff's bill generally and for the want of proper parties, and they, also, answered said bill. In their answers they pleaded the statute of limitations and denied any breach of the administration bond of said L. E. Vintroux as administrator as aforesaid, or that there was any liability on them, or either of them, by reason of the matters alleged in plaintiff's bill. The court overruled said demurrer and, at a subsequent term, the plaintiff amended his bill by making J. J. Thompson, late committee of said Mary Staton, a party defendant. After having referred the cause to a commissioner for certain accounts, which were taken and reported but never acted on by the court, the cause was, on May 6, 1880, finally heard, and the court having decided that the plaintiff's right to recover was not barred by the statute of limitations, decreed that the plaintiff as administrator of Mary Staton, deceased, recover against the defendants, Robert M. Hall and Robert T. Harvey *de bonis propriis*, and against J. T. Bowyer and J. B. Dudding, executors, O. L. Vintroux, executrix, and J. L. Timms, administrator &c., *de bonis testatoris*, six thousand five hundred and ninety-nine dollars and sixty-eight cents with interest thereon from the said 6th day of May, 1880, until paid and costs. From this decree J. T. Bowyer and J. B. Dudding, executors, R. M. Hall and R. T. Harvey have appealed to this Court.

The material facts as shown by the record are as follows :

On the 27th day of June, 1853, Lewis E. Vintroux qualified in the county court of Putnam county as administrator of James Staton, deceased, and gave bond as such administrator in the penalty of twenty thousand dollars, with John Bowyer, Robert T. Harvey, Robert M. Hall and Allen Sebrell as his sureties. The said James Staton left a large amount of personal and real estate, also, a widow, the said Mary Staton, and several children as his heirs and distributees. His widow, the said Mary, having become a lunatic, J. J. Thompson, on the 20th day of July, 1856, qualified as her committee in the county court of Putnam county, and on June 23, 1857, the said L. E. Vintroux admitted that there was in his hands as such administrator two thousand eight hundred dollars due the said Mary as of January 1, 1855, and offered to give to said Thompson as her committee his bond for said sum and take his receipt therefor, which offer the said Thompson accepted and the bond and receipt were given and are in the words following:

“\$2,800. One day after date, I promise and bind myself, my heirs, &c., to pay J. J. Thompson, committee of Mary Staton, the sum of two thousand eight hundred dollars, with legal interest from the first day of January, 1855, for value received.

“As witness my hand and seal this 23d day of June, 1857.

“L. E. VINTROUX, [SEAL.]

“*Administrator of estate of Jas. Staton, deceased.*”

On the back of said bond is this endorsement:

“January 1, 1858, by your note for five hundred and four dollars.”

RECEIPT.

“\$2,800. Received of L. E. Vintroux, administrator of the estate of James Staton, deceased, his note for two thousand eight hundred dollars, payable one day after date, bearing interest from the 1st day of January, 1855, and dated the 23d June, 1857.

“J. J. THOMPSON,

“*Committee of the estate of Mary Staton.*”

On the 1st day of October, 1857, said L. E. Vintroux made an *ex parte* settlement of his administration accounts before J. W. Hoge a commissioner of the county court of

said county and was therein credited with two thousand eight hundred dollars as having been paid by him to J. J. Thompson committee, per his receipt; and there was also found due by said settlement from said administrator as of September 1, 1857, two hundred and thirty-six dollars and thirty-one cents to the estate of his intestate.

This settlement was returned to the recorder's office of said county and recorded therein on the 18th day of February, 1865. Some time between March 22, 1858, and August 23, 1858, said Thompson resigned his trust as such committee and J. W. Hoge about the same time, was appointed and qualified as such committee of said Mary. In September, 1858, the said Thompson made a settlement of his accounts as committee of the said Mary before J. W. Hoge, a commissioner of said county court. From this settlement it appears that said Thomson had, on or before August 23, 1858, delivered to said J. W. Hoge as his successor four thousand seven hundred and twenty-eight dollars and eight cents in bonds on different persons belonging to the estate of said lunatic and among them the said bond of L. E. Vintroux, administrator, for two thousand eight hundred dollars, subject to a credit by said Vintroux's bond for five hundred and four dollars, dated and due January 1, 1858; and, also, said bond for five hundred and four dollars subject to a credit for one hundred and fifty dollars paid June 28, 1858. This latter bond was given for the interest on said bond of two thousand eight hundred dollars from January 1, 1855, to January 1, 1858. This settlement was returned to said recorder's office and recorded therein, on January 11, 1868. The said Mary Staton, having died, prior to July 25, 1859, the said J. W. Hoge, on that day, qualified as her administrator; and the said L. E. Vintroux and Allen Sebrell, having, also, died, O. L. Vintroux, the widow of the former, qualified as his executrix on the 26th May, 1862, and L. J. Timms qualified as the administrator of the latter May 11, 1868. In January, 1868, the said J. W. Hoge as late committee and as administrator of said Mary Staton, made an *ex parte* settlement of his accounts as such committee and administrator before J. T. Bowyer, a commissioner of the recorder's court of said county. The said

commissioner in his report of said settlement states, and the report shows he correctly so states, that he, "on the 1st day of January, 1868, finds that the said James W. Hoge has in his hands, principal and interest, due by the bonds of Dr. James Stewart, and L. E. Vintroux for himself and as administrator of James Staton, sr., deceased, the sum of eight thousand two hundred and seven dollars and twenty-one cents, and that said estate is indebted to said committee, James W. Hoge, in the sum of eight hundred and ninety-one dollars and thirteen cents for money advanced by him, and its interest, his commissions and the cost of this commissioner in taking this account; that after the payment of the amount so due the said Hoge, there will be left the sum of seven thousand three hundred and sixteen dollars and eight cents to be divided into five parts between her children and heirs, to-wit: One thousand four hundred and sixty dollars and twenty-one and three fifths cents to Moses F. Ward; a like sum to Mrs. — Thomas; a like sum to Mrs O. L. Vintroux; a like sum to Mrs. Martha Stewart and a like sum to Mrs. Geo. W. Cox, Simon C. Staton and Martha Staton, children of James Staton, jr., deceased; that Dr. Stewart will be entitled to the sum of forty dollars and seventy-seven cents, as his wife's share of the estate, more than he is indebted to the same; that after the payment of the amount due Hoge as aforesaid, and the said forty dollars and seventy-seven cents to Dr. Stewart, and allowing her her share, Mrs. O. L. Vintroux, as the executrix of L. E. Vintroux and administrator *de bonis non* of the estate of James Staton, sr., deceased, will owe the sum of four thousand three hundred and eighty-nine dollars and sixty-four cents, to be divided equally between Moses F. Ward, Mrs. — Thomas and the said heirs of James Staton, jr., deceased."

It will be observed that in the above statement the commissioner mentions Mrs. O. L. Vintroux as being the administratrix *de bonis non* of James Staton, sr., deceased. There is nothing in the record here to show that she ever qualified as such administratrix, and I take it that said statement is incorrect—the commissioner, evidently regarding her as such administratrix by reason of her being the executrix of L. E. Vintroux who had been administrator of said James Staton, sr.

The aforesaid settlement of J. W. Hogg was returned to said recorder's office and on July 7, 1868, recorded therein.

Between January, 1864, and May 9, 1868, O. L. Vintroux, as executrix of L. E. Vintroux, deceased, made three several *ex parte* settlements of her executorial accounts before commissioners of the recorder's court of said county, the last of which was recorded therein April 25, 1870, and the others before that date. From these settlements it appears that over twenty thousand dollars of assets came into her hands as executrix, and that she paid debts of her testator to an amount exceeding forty thousand dollars.

In the commissioner's report made in this cause the commissioner states, "that assets belonging to the estate of L. E. Vintroux, deceased, to the amount of nineteen thousand two hundred and eighty-three dollars and nine cents, went into the hands of the defendant, O. L. Vintroux, as his executrix, and that she paid out for said estate, including her commissions, forty-one thousand three hundred and ninety-two dollars and forty-five cents, leaving due her as such executrix twenty-two thousand one hundred and nine dollars and thirty-six cents. Of this amount thirty-one thousand and twenty-six dollars and ninety-nine cents was expended in paying the bonds and accrued interest of said L. E. Vintroux, five thousand three hundred and forty-two dollars and sixty-seven cents was paid on judgments, three thousand eight hundred and thirty-four dollars and eighty-two cents was paid in discharge of open accounts and costs of administration, including one thousand nine hundred and seventy-four dollars and ninety-three cents allowed executrix as commissions, and the remainder two hundred and sixty-nine dollars and twenty cents was paid for taxes." The said commissioner, also, reports the unpaid claims against the estate of L. E. Vintroux as of September 1, 1874, and the order of their priorities as follows:

Amount due O. L. Vintroux, executrix	\$22,109.36
Bond and interest sued on in this cause	5,600.00
Judgment of R. B. Swindler	471.46
Judgment of Langley & Kincaid	476.74
Judgment of J. W. Hogg, administrator, &c.	2,803.12
Balance due estate of James Staton	478.02

Total unpaid debts..... \$31,938.70

The aforesaid bond of five hundred and four dollars due January 1, 1858, for interest on the bond of two thousand eight hundred dollars from January 1, 1855, to January 1, 1858, is included in and forms part of the above judgment for two thousand eight hundred and three dollars and twelve cents in favor of J. W. Hogg, administrator, &c.

The said commissioner, also, reports, "that the two thousand eight hundred dollars credited by commissioner J. W. Hogg to L. E. Vintroux, administrator of James Staton, deceased, as paid to the committee of Mrs. Mary Staton, was never actually paid by him; that the said Vintroux as administrator of the estate of James Staton, deceased, was indebted to the committee of Mrs. Mary Staton in the sum of two thousand eight hundred dollars for her dower interest in the personal estate of her husband, James Staton, and in place of paying over that amount in cash to the committee he retained the money and gave his bond for the amount which the said committee consented to receive; that in fact no money passed between them. Your commissioner is of opinion that it was not the intention of said L. E. Vintroux or of the said J. J. Thompson as committee to release the said Vintroux as administrator of James Staton from liability as such administrator for said two thousand eight hundred dollars to the estate of Mary Staton." This conclusion of the commissioner, I think, is fully sustained by the form of the bond and receipt given and the testimony of J. J. Thompson taken in the cause.

It further appears from said commissioner's report, that all the assets of the estate of L. E. Vintroux have been disbursed and that there is nothing now, or likely to come, into the hands of his executrix to pay any part of the aforesaid unpaid debts. It is, also, shown, as I think distinctly, by the proof in this cause that Mrs. O. L. Vintroux as executrix and Dr. James Stewart, her agent, in settling the estate of her husband, had actual notice of the existence of the claims sued for in this cause soon after she qualified as executrix and long before she disbursed the greater part of the assets. If she did not have actual notice of the precise amount of the plaintiff's claims she had notice that such claims existed and sufficient knowledge to put her on the enquiry as to the amount claimed.

S. C. Staton, states in his deposition taken in the cause, that he is one of the heirs of Mary Staton, deceased, and that his interest has been paid to him by Dr. James Stewart, and that he claims no interest in the fund in this suit. And Dr. James Stewart, whose deposition is also filed in this cause, states therein, that his wife is one of the heirs of Mary and James Staton, deceased; that the amount of his wife's interest as heir of said Mary, he thinks, was one thousand four hundred dollars or one thousand five hundred dollars; that this interest has been paid to him in part by canceling debts due from him for rents of land and the hire of slaves belonging to the dower of said Mary, and that the balance of his wife's claim or interest, he thinks was paid to him by Mrs. Vintroux; and that he claims nothing in this suit unless Mrs. Ward and Mrs. Thomas are not heirs of the estate. That the balance paid him by Mrs. Vintroux was about forty dollars.

The foregoing are all the facts in the record, which I deem it material to state in order to dispose of the questions presented to this Court for decision.

The first error assigned by the appellants is, that the court erred in overruling the defendants' demurrer to the plaintiff's bill, because the plaintiff had a complete remedy at law.

While the plaintiff might have sued at law on the ascertained claim of two thousand eight hundred dollars, still as there were other matters involved requiring accounts to be taken and the settlement of the estates of Mary Staton and L. E. Vintroux and, perhaps, of James Staton, it was certainly proper and much more convenient as well as to the interest of all the parties to have the whole matter settled in one suit. This could not have been done at law. I am, therefore, of opinion that there was no error in overruling the demurrer of the defendants for the cause assigned. But if the demurrants had assigned as ground of demurrer, that the administrator of James Staton and the heirs and distributees of said James and Mary Staton had not been made parties, I think, the demurrer should have been sustained and an order made requiring the plaintiff to amend his bill making said administrator, heirs and distributees parties, for reasons which I shall hereinafter state.

The second error assigned is, that the court improperly overruled the defense of the statute of limitations.

This suit is on an administrator's bond to recover against the obligors therein, principal and sureties, for an alleged breach of said bond. The limitation against the sureties in such case is ten years from the return day of an execution on the plaintiff's claim if judgment has been obtained on his claim; and if not, then, it is ten years from the time the administrator shall have been ordered by a court, acting upon his account, to pay the claim of the plaintiff. Code ch. 104 §§ 6 and 7.

The plaintiff's intestate in this cause was insane at the time the cause of action arose and so continued to her death; consequently, the statute did not commence to run until her administrator qualified, on July 25, 1859. Code ch. 104 §§ 16 and 17.

This suit having been brought, on the 5th day of October, 1868, less than ten years from the date of the qualification of the plaintiff as administrator of his intestate, the same is not barred by the statute of limitations. And it having been brought before the 1st day of April, 1869, the period from April 17, 1861, to March 1, 1865, must be excluded in computing said ten years. Code ch. 136 § 4; *Pitzer v. Burns*, 7 W. Va. 68.

The third error assigned is, that the court improperly entered a decree for six thousand five hundred and ninety-nine dollars and sixty-eight cents against appellants and others. Under this assignment it is claimed that the bond of two thousand eight hundred dollars was the individual obligation of L. E. Vintroux; that its acceptance by J. J. Thompson, committee, without the knowledge or consent of the sureties on said Vintroux's administration bond, and being payable one day after date, tied the hands of said sureties for that period, and thereby absolved and released them from all liability.

In *Sayre v. King*, 17 W. Va. 562, this Court decided, that, if a bond or note, not negotiable, be given by a debtor to his creditor for an existing debt, such bond or note is *prima facie* not a conditional payment, but collateral security for the original debt, though *it may be proven* by either direct

or circumstantial evidence to have been intended by the parties to be an absolute or a conditional payment. If such bond or note was received as collateral security, though it be payable at a future time, unless there was an agreement to postpone the right of action on the original debt *proven by other evidence* direct or circumstantial, the taking of such collateral security does not suspend the right of action on the original debt, and therefore does not discharge the sureties from their liability. 17 W. Va. 575.

The evidence in this suit, as before stated, does not rebut the *prima facie* presumption that the bond of two thousand eight hundred dollars was given as collateral security, but it all tends to prove that said bond was, by the agreement and understanding of the parties, intended simply as collateral security for so much of the liability of L. E. Vintroux, administrator, to the committee of Mary Staton. The face of the bond and receipt, without regard to the direct testimony of Thompson, it seems to me, establish the fact satisfactorily, that it was not intended to discharge the original debt or change the security therefor by the giving of said bond and receipt. The bond is signed, "L. E. Vintroux administrator of estate of James Staton, deceased," and the receipt states expressly, that it was given *for the bond* of the administrator which is fully described therein. It is not here asserted that the mode of signing the bond in this instance made it the bond of the administrator in his fiduciary capacity, for such was not the case; but it is claimed, simply, that the parties, by the writings exchanged, intended, on their face, to preserve the history of the transaction and thereby show its real character.

But even if it had been agreed between L. E. Vintroux as administrator and Thompson as committee, that said bond should be a satisfaction of the original debt, such an agreement would be disregarded in a court of equity. Both parties were acting in a fiduciary capacity, and neither had any authority except that conferred upon him by his appointment and the law defining the duties of his trust.

And persons dealing with such fiduciary are charged with notice of the extent of his authority and will be held to be participants in any loss or *devastavit* resulting from his im-

proper acts. *Utterback v. Cooper*, 28 Gratt. 233; *Treasurers v. McDowell*, 26 Am. Dec. 166.

In *Stuart v. Abbott*, 9 Gratt. 252, one of three executors took the personal obligation of a party and released a lien on land as security for a debt due his testator, and it was held that such a release would not be enforced. In the opinion the court say: "Such a contract, if made, should receive no countenance in a court of equity." It was held to be in effect a contract to commit waste. 2 Wms. on Ex'ors 1104.

In the case at bar, it appears that the administrator of James Staton, deceased, as such administrator, was indebted to, or had in his hands for, the widow of his intestate, who was then a lunatic, on account of her distributive share of said estate, two thousand eight hundred dollars, which had been due since January 1, 1855, and that on the 23d day of June, 1857, he informed the committee of said lunatic that he desired to settle, but not having the money to pay over he offered to give his bond for said amount, which he did, and the committee says he acquiesced and took said bond. I do not believe from the testimony and circumstances, that this transaction was intended by the parties as a discharge of the original liability for which the administrator and his sureties were bound; but if it was so intended, it was a *devastavit* and an unauthorized act on the part of the committee suggested and participated in by the administrator of James Staton, and can not for a moment receive the countenance or approbation of a court of equity. The act was just as illegal on the part of the administrator as it was on the part of the committee, and the former is more culpable than the latter, because he received the whole benefit of it and procured it to be done. If the said bond had been subsequently paid it would have of course discharged the debt, but as it was not paid the beneficiaries of the estate of the lunatic have the right to repudiate the transaction and to recover the debt from the estate of the administrator and his sureties. And the giving of the said bond being thus improper and an act of bad faith as against the plaintiff, I do not think the fact of the administrator having been allowed credit for the amount in an *ex parte* settlement, which was not recorded until within less than four years prior to

the institution of this suit, can in any manner affect the transaction. I am of opinion, therefore, that the estate of L. E. Vintroux and the sureties on his administration bond are liable for the amount included in said bond of two thousand eight hundred dollars, or so much thereof as remains unpaid or otherwise unsatisfied.

And I am further of opinion, that the said bond of five hundred and four dollars, dated January 1, 1858, having been given for interest on said two thousand eight hundred dollars, must in like manner and for the same reasons, be held to be a charge against the estate of said administrator and his sureties, except in so far as the same has been paid or otherwise discharged. It seems from the record that one hundred and fifty dollars was paid on this bond on June 28, 1858; but it is not my purpose now to decide that such is the fact. The cause will have to be sent again to the circuit court and the matter can there be investigated and determined.

It is further claimed as error that the court decreed against the appellants for the whole amount of said bond of two thousand eight hundred dollars and interest and, also, for the balance of two hundred and thirty-six dollars and thirty-one cents found due from L. E. Vintroux as administrator of James Staton, deceased, in the settlement made by him January 1, 1858. I am of opinion that this claim is well taken.

It appears from the statement of the commissioner, to whom this cause was referred, and which statement has been hereinbefore given, that the heirs and distributees of James and Mary Staton, deceased, are Moses F. Ward, Mrs. Thomas, Mrs. O. L. Vintroux, Mrs. Dr. James Stewart and the children of James Staton sr., deceased. It is shown by the facts in this cause that Mrs. O. L. Vintroux, who is one of said distributees, has as administratrix of her husband's estate made herself personally, and her sureties on her executorial bond, if she has any, liable for the preferred claims sought to be recovered in this suit, by reason of her *devastavit* in paying unpreferred debts in full and paying nothing in the claims of the plaintiff. The assets which came into her hands, if properly administered, would have paid nearly fifty cents on the dollar of the debts of her testator.

She had ample notice of the plaintiff's preferred claim, as we have seen, and although she may have paid other debts in full to an amount largely in excess of the assets which came to her hands, yet for such debts paid in full she, in her executorial settlement, will not be entitled to credit for any sum beyond the *pro rata*, to which said debts would have been entitled to be paid if said assets had been properly administered. If her accounts are so settled there will appear to be in her hands a sum sufficient to pay, perhaps, the whole of the plaintiff's claim in this cause. And while such sum may not in fact be in her hands or recoverable from her by reason of her insolvency, still it is unjust that the appellants here should be required to pay to her, or to the plaintiff for her, a large sum as the sureties of her husband, when she by her *derastavit* of her husband's estate has made it greatly less able to satisfy the plaintiff's claim to the relief of said sureties. The amount due to her as distributee of the estates of James and Mary Staton should be ascertained and deducted from the amount sought to be recovered in this suit, at least to the extent of the assets, which came to her hands as executrix of her husband, would, if properly administered, have reduced said amount.

It further appears from the evidence in this cause, that Mrs. Dr. James Stewart, another distributee of the fund here sought to be recovered, has been paid off in full; and there is some evidence that S. C. Staton, another distributee, has assigned his claim to Dr. James Stewart and has, also been paid.

The balance of two hundred and thirty-six dollars and thirty-one cents found to be due from L. E. Vintroux as administrator of the estate of James Staton, deceased, could not have been properly included in the recovery in this suit without first having made the personal representatives of said James Staton a party to this cause. The balance thus appearing may have been retained by the administrator for the payment of debts of said estate or it may have been due to other distributees than the widow. It would seem probable that, as the administrator gave his bond to the committee of the widow for a sum certain, there was nothing further due her. At all events, it was improper to assume that she was

entitled to one third or any other part of said two hundred and thirty-six dollars and thirty-one cents in the absence of the personal representative of said estate.

I am of opinion that, for the errors hereinbefore indicated, the decree of the circuit court, rendered on the 6th day of May, 1880, should be reversed with costs to the appellants, and that this cause be remanded to said circuit court with directions to that court to permit the plaintiff to make the personal representative of the estate of James Staton, deceased, and also all the heirs and distributees of the said James and Mary Staton, parties defendants to this suit; that after said parties are before the court, then, proper accounts shall be directed and taken, and the true sum due to each of the distributees of said James and Mary Staton be ascertained, and the amount found to be due to O. L. Vintroux, to the extent hereinbefore indicated, be deducted from the amount sought to be recovered in this suit from the sureties of L. E. Vintroux as administrator of said James Staton; that whatever has been paid to Mrs. James Stewart or any other of said distributees which it shall be found proper to deduct from said liability of said sureties be also credited to them; and that such other and further proceedings be had in the cause in said court as are in accordance with the principles announced in this opinion and further according to the rules and practices of courts of equity.

THE OTHER JUDGES CONCURRED.

DECREE REVERSED. CAUSE REMANDED.

WHEELING.

JOHNSTON v. MANN'S EXECUTORS.

Submitted January 25, 1882—Decided November 25, 1882.

(*SNYDER, JUDGE, Absent.)

1. As in ejectment the action prior to the act of 1877 could be brought only against the party in possession, when the premises were occupied, one, who is interested in the subject of the action

*Cause submitted before Judge S. took his seat on the bench.

though not a party to the record, and who employs counsel and defends the action, after verdict with judgment for plaintiff, and execution for costs unsatisfied, may be required to pay the costs of plaintiff in such action. (p. 18.)

2. A landlord, who is entitled to be substituted in the place of or joined with the defendant in ejectment, and without causing himself to be made a party defends such action unsuccessfully in the name of the original defendant, will be ordered to pay the costs of the plaintiff, after execution against the defendant on the record has been returned unsatisfied. (p. 19.)
3. The appropriate mode of requiring such person to pay such costs, is by rule, requiring him to show cause why he should not be compelled to pay the same. (p. 21.)

Writ of error and *supersedeas* to a judgment of the circuit court of the county of Greenbrier, rendered on the 29th day of April, 1881, in an action in said court then pending, wherein Andrew D. Johnson was plaintiff and James and Mathew Mann, executors of William T. Mann, deceased, were defendants, allowed upon the petition of the said defendants.

Hon. Homer A. Holt, judge of the tenth judicial circuit, rendered the judgment complained of.

The facts of the case are fully stated in the opinion of the Court.

Samuel Price for plaintiffs in error cited Acts of 1877, ch. 110 p. 160 § 5; Code Va., ch. 135 p. 610 § 5; Code, p. 518 ch. 90 § 5.

Adam C. Snyder for defendant in error cited 4 Phil. Ev. (Cow. & Hill's Notes) pp. 838-9; 25 Gratt. 760; 3 Pick. 490; Tyler Eject. pp. 586-7; 10 B. & Cress. 110; *Id.* 615; *Id.* 113; 1 Wend. 295; 4 Gratt. 129; 2 Call 499; 3 U. S. Dig. "Costs;" 2 Br. & Had. Com. 212; Code Va., p. 610 ch. 135 § 5; Code, ch. 90 p. 518 § 5; 82 E. C. L. 322.

JOHNSTON, PRESIDENT, announced the opinion of the Court :

In 1856 Andrew D. Johnston brought his action of ejectment in the circuit court of Greenbrier county against Lyman Griswold and Cornelius Rodgers, for the recovery of

a tract of about eighty acres of land. There was verdict and judgment for plaintiff. The case was upon writ of error taken to the Court of Appeals of this State, where the judgment was reversed, verdict set aside and case remanded for a new trial. On said new trial plaintiff again recovered. Before the second trial was had, W. T. Mann, the testator, died, and the plaintiffs in error, his sons James and Mathew Mann, qualified as his executors. In the said ejectment suit execution was issued for the costs against the defendants, and was returned "no property." Johnston filed his affidavit in which he set forth the prosecution of said ejectment suit, and that said Griswold and Rodgers were the tenants of William T. Mann at the time said action was instituted, and perhaps at some time during the pending of said action the said Rodgers entered into an executory contract with said Mann, for the purchase of a part of the land in controversy, but if such contract was made no deed was ever made to said Rodgers by Mann for said lands; that said Mann employed counsel and actively defended said action; that at the October term, 1873, said action was tried and verdict and judgment rendered for plaintiff; that at that time said Mann, by his agent his son, was present conducting and assisting by himself and counsel in the defense of said action, &c. Affiant prayed for a rule against said executors, to show cause why they should not pay the costs of said suit. The rule issued, and Mathew Mann, one of the executors, answered, that they never asserted any interest in said suit or the subject thereof; that he had heard, that his father was a party to said suit, but on enquiry found he was not; that he believes, that said William T. Mann neither had nor claimed to have any interest in the said suit.

From the bill of exceptions it clearly appears, that William T. Mann claimed the legal title to said land, and the said Griswold and Rodgers were either his tenants or purchasers from him of the land in controversy, which they were does not clearly appear; and that William T. Mann, did employ counsel and defended said suit in the names of said defendants; that he was not a party to the suit, and that while he was so defending the suit, one hundred and sixty-three dollars and thirty-one cents costs accrued, which were

included in the judgment for costs against the defendants, an execution on which was returned "no property." For this sum, on the 29th day of April, 1881, the said circuit court of Greenbrier county gave judgment against said executors *de bonis testatoris*. To this judgment they obtained a writ of error.

Did the rule properly issue, and was the judgment against the executors to pay the costs authorized by law? In Doc dem. *Masters v. Gray*, 10 B. & C. 615, it appeared, that the premises sought to be recovered in ejectment were claimed by the parish-officers and inhabitants of the township of Norton, in the county of Hereford, as parish-property. The defendant, a pauper, had been put in possession of the premises by the parish-officers. Upon ejectment being brought, an order of vestry was made, that the action should be defended by and at the expense of the inhabitants of the township of Norton. The action was accordingly defended by an attorney employed and paid by them. There was a verdict, also a judgment for plaintiff. The plaintiff applied to the parish-officers for payment of the costs, which being refused, a rule was awarded against them to show cause why they should not pay the costs. Lord Tenterden, C. J., said: "In ejectment we can make the real party pay the costs. *Thrustout v. Shenton*, 10 B. & C. 110. Here the parish-officers put a mere pauper in possession, and the lessee of the plaintiff was bound to bring the ejectment against him. The parish-officers therefore, ought to pay the costs." In *Berkeley v. Dimery*, 10 B. & C. 113, the action was for breaking and entering the plaintiff's close, cutting heath, &c., and it was found that the trespass was mainly committed by one Hill, who was not a party to the suit, and after judgment, plaintiff moved for a rule against Hill, to show cause why he should not pay the damages and costs recovered in the action, and relied on *Thrustout v. Shenton*, *supra*. Lord Tenterden, C. J., distinguished the case from *Thrustout v. Shenton*, and said: "In ejectment, the tenant in possession must be sued, and the court will not permit a person to put a mere pauper into possession merely to evade the costs. Here Hill might have been sued, as a trespasser, either jointly or singly, and if he had been sued singly, the now defendants might have

been called as witnesses. It is said that the plaintiff did not know, that Hill was the substantial defendant. Parties should take care before and when they sue, to ascertain who is the substantial defendant. If the court were to grant this rule, the application to subject to costs persons who were not parties to the record would be frequent." The rule was refused.

In *Jackson ex dem. Martin and others v. Van Antwerp*, 1 Wend. 295, it was held, that in ejectment where a party in interest, though not a party, defended the suit in the name of another, who was his tenant, will be ordered to pay the costs of the suit, an execution, against the defendant having been returned unsatisfied.

It will be observed that this is an exception to the general rule, that no one can be held liable for costs in an action to which he is not a party. And this exception appears to apply only to the action of ejectment. The ground of the distinction is, that in ejectment the suit can only be brought against the party in possession, where the premises are occupied, and the courts will not permit the party really interested to put an irresponsible party in possession to evade costs. It would seem unjust, that the party most interested should be permitted to appear in court by counsel, defend the action and have the whole benefit resulting from the action; and then escape all responsibility that should result from an adverse determination of the action. In *Hutchinson v. Greenwood*, 82 Com. L. Report 324, the decree by two judges of three who sat in the case, went much further and held, that though the parties who carried on the defense had no interest whatever in the land, but who carried on the defense in the names of the parties in possession for a young lady a relation who claimed to own the land, yet they were on a rule, required to pay the costs. Lord Campbell C. J. said: "The principle is, that the individuals, who order an appearance to be entered in ejectment in the names of those not really defending the suit, abuse our process, and that, as they substantially are the suitors, we have jurisdiction to make them pay the costs."

We cannot affirm this decision to the extent, that any one whether interested in the subject of an ejectment suit or not, who employs counsel to defend it for a friend, thereby makes

himself liable for costs. It was also held in that case, that the Common Law Practice Act of 1852, which abolished fictions in an ejectment, did not affect the right to make under certain circumstances a person really defending liable for costs although not a party to the record. As our law was in 1856, and as it remained until 1877, when the ejectment set out in this record was brought, the plaintiff in an ejectment was bound to make the party in possession of the land at the institution of the action defendant thereto, where the land was occupied, and no one else. Sec. 5 chap. 135 p. 610 of Code of Va. 1860, is as follows: "*The person actually occupying the premises shall be named defendants in the declaration. If they be not occupied the action must be against some person exercising acts of ownership thereon, or claiming title thereto, or some interest therein at the commencement of the suit. If a lessee be made defendant at the suit of a party claiming against the title of his landlord, such landlord may appear and be made a defendant with or in place of the lessee.*" In such case it was optional with the landlord whether he should appear or not. The plaintiff could not make him a defendant, when the premises were occupied by his tenants. So at the time said ejectment was brought, the defendants being in possession, the plaintiff was compelled to make them, and them alone, defendants to the action, and under the authorities we have cited, William T. Mann, who claimed the legal title to the land in controversy, and was therefore directly interested in the action, by employing counsel, and defending it, the defendants being insolvent, was liable for costs.

It does not clearly appear from the record, whether these parties defendant were tenants of, or purchasers of William T. Mann. If they were purchasers, the English decisions would clearly apply.

In this country it has been held, that the landlord, who is entitled to be substituted in the place of or joined with the defendant in ejectment and without causing himself to be made a party defends such suit unsuccessfully in the name of the original defendant, will be ordered to pay the costs of the plaintiff, after execution against the defendant on the record has been returned unsatisfied. Tyler on Ejectment

588; *Farmers' Loan and Trust Co. v. Kursch*, 5 N. Y. 558; *Jackson v. Van Antwerp*, *supra*. We think on both principle and authority the executors of William T. Mann, should have been required to pay the costs incurred in the action while their testator was defending it; and we also think, that the proper mode of enforcing it was, upon a rule to show cause why the defendants thereto should not be required to pay said costs. The judgment of the circuit court is therefore affirmed with costs and damages according to law.

JUDGES HAYMOND AND GREEN CONCURRED.

JUDGMENT AFFIRMED.

WHEELING.

LAIDLEY *et al.* v. KLINE'S ADM'R *et al.*

Submitted June 23, 1882—Decided November 25, 1882.

An appeal is awarded to a decree which does not adjudicate the principles of the cause, nor is it otherwise such a decree as can be appealed from to this Court, such appeal will be dismissed as prematurely and improvidently awarded.

Appeal from a decree of the circuit court of the county of Kanawha, rendered on the 13th day of July, 1881, in a cause in said court then pending, wherein James M. Laidley and others were plaintiffs, and D. H. Kline's administrator and others were defendants, allowed upon the petition of said defendants.

Hon. Joseph Smith, judge of the seventh judicial circuit, rendered the decree appealed from.

The facts of the case appear in the opinion of the Court.

J. M. Laidley, J. M. Payne, and T. B. Swann for appellants.

E. B. Knight and J. A. Warth for appellees.

SNYDER, JUDGE, announced the opinion of the Court:

A sufficient statement of the character and objects of this suit may be found in the report of same in 8 W. Va. Report

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49	357

21	21
46	407

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55	131

21	21
62	120

218, when it was before this Court on a former appeal. After the cause was remanded to the circuit court of Kanawha county that court referred it to a commissioner for certain accounts which were taken and a report thereof made and returned. The present appellants and others filed exceptions to said report and the court on the 13th day of July, 1881, entered the decree now appealed from which is as follows:

“This cause came on to-day to be heard upon the papers heretofore read and proceedings had therein, and upon the report of Peter Fontaine filed in this cause December 12, 1878, and upon the exceptions taken to said report by the heirs of D. H. Kline, deceased, and the guardian *ad litem* of the infant heirs of D. H. Kline, deceased, and upon the exceptions of H. W. Reynolds, Truax, Baldwin & Co., and James M. Laidley respectively, to said report, and was argued by counsel. Upon consideration whereof, it is adjudged, ordered and decreed that the exceptions taken to said report as to the claims of A. M. Smith, Grief Miller and Fitzhugh, Hedrick and Laidley, commissioners, be and each of them is sustained, and each of said claims is disallowed and rejected. It is further adjudged, ordered and decreed that the said exceptions to said report of H. W. Reynolds, Truax, Baldwin & Co., and James M. Laidley be and they are each overruled, and the said claims of H. W. Reynolds and Truax, Baldwin & Co., are disallowed and rejected.”

This decree shows on its face that it does not adjudicate the principles of the entire cause nor is it otherwise such a decree as can be appealed from to this Court. The record here shows no other decree in the cause, but it does show that a number of claims other than those of the appellants were reported by the commissioner, and as those claims were in no manner considered or passed upon by the court, and the commissioner's report not having been confirmed, the appeal must be dismissed as prematurely and improvidently awarded with costs to the appellees against the appellants.

THE OTHER JUDGES CONCURRED.

APPEAL DISMISSED.

WHEELING.

TERESA DOWER *et als.* v. CHURCH *et als.*

Submitted January 14, 1881—Decided December 2, 1882.

(*SNYDER, JUDGE, Absent.)

21	23
37	46
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42	308
21	23
53	232
53	253
53	301
53	554

1. Upon a bill in chancery to contest the validity of a will, which has been regularly admitted to probate, the functions of the suit are exhausted when that question is decided; and if the will is declared invalid and null, it is not competent for the court to proceed in that cause further, as for instance to establish another will, which had not been offered for probate though this was also asked in the bill by the plaintiffs, the devisees in such alleged will, and though the bill alleged, that this other will had been improperly destroyed. And therefore it is not necessary for the plaintiffs in such first bill to offer any proof of the execution of such first will, before the court directs an issue of *devisavit vel non* as to the will probated. (p. 43.)
2. Upon a motion to set aside a verdict on such an issue of *devisavit vel non*, on the ground that the verdict is contrary to the evidence, the court overrules the motion and makes a decree according to the verdict, and the party moving files a bill of exceptions to the refusal of the court to set aside the verdict, and all the evidence is set out in the bill of exceptions and it is all parol evidence, the Appellate Court will reject all of the evidence of the exceptors, which is in conflict with that of the other party; and if upon the evidence of the appellee, giving it full force and effect, and of that of the appellant not in conflict with it the case is in favor of the appellee, the decree will be affirmed. (p. 63.)
3. If in such a case the plaintiffs in the chancery suit are the devisees under a former will of the testator seeking to set aside a later will, which had been admitted to probate and which revoked the will under which the plaintiffs claimed, the heirs of the decedent should be made parties defendants as well as those parties, that claim under the will of the decedent, which had been probated. (p. 50.)
4. But if in such a case, the heirs of the intestate are not made parties, and no objection is made in the court below till after the issue of *devisavit vel non* has been made up and tried, and the jury has returned a verdict against the will, which has been probated, those claiming under this will cannot then be heard to object

*Cause submitted before Judge S. took his seat upon the bench.

to the entering of a decree in accordance with the verdict, because the heirs had not been made parties. (p. 49.)

5. On the trial of such an issue witnesses, who have stated the facts seen by them shortly prior or subsequent to the making of the paper by the intestate claimed to be his will, which indicate the capacity or incapacity of the decedent to make a will, may give their opinion to the jury based on such facts as to whether the testator was or was not competent to transact business of importance. For though the fact, that he was not competent to transact such business, would not prove him incompetent to make a will, yet it is evidence, which in connection with the facts proven and other evidence might tend to show incompetency and is proper to be considered by the jury in trying such an issue. (p. 59.)
6. A new trial ought not to be granted for evidence discovered after the verdict is rendered, if this evidence be merely cumulative or such as ought not to affect the result; or if it appeared, that due diligence to discover the evidence was not used before the trial. (p. 57.)
7. A juryman heard, under circumstances unfavorable to his understanding clearly, a casual conversation between a witness in the case and a stranger, neither of whom knew he was a juror, in which comments were made on another witness and on the evidence. The juror remarked to one of them, that the witness criticised wanted to come back and explain his evidence, but was not allowed to do so, and that two other witnesses had contradicted him. He also said, he thought he knew how the jury stood. The stranger then asked some question, and he the juror then informed him he was one of the jury. The counsel of the party against whom the verdict was afterwards rendered, before the case was submitted to the jury, was informed by this stranger of this occurrence, but he could not tell the name of the juror. The attention of the court was not called to the matter till after the rendition of the verdict. **Held:**

That the circuit court did not err in refusing, under these circumstances, to grant a new trial on account of the misconduct of this juror. (p. 55.)

Appeal from a decree of the circuit court of the county of Mason, rendered on the first day of November, 1877, in a cause in said court then pending, wherein Teresa Dower and others were plaintiffs, and Ann E. Church and others were defendants, allowed upon the petition of said defendants.

Hon. Joseph Smith, judge of the seventh judicial circuit, rendered the decree appealed from.

John W. English for appellants:

The issue *devisavit vel non* stands on a very different footing from an ordinary issue out of chancery; it is a law issue tried under the supervision of the chancellor, and not for the information of the conscience of the chancellor, and his conscience is not necessarily satisfied with the verdict. *Coalter's Ex'ors et al. v. Bryan and wife*, 1 Gratt. 82, also *Malone's Adm'r. et al. v. Hobbs et al.* 1 Rob. 388.

The trial of said issue is directed by statute: "It is a probate jurisdiction to be exercised by the jury, not by the chancellor; his only province is to convene the parties, cause the prescribed issue to be made up and tried, with the incidental power to grant a new trial, and in granting a new trial or refusing it the court would be controlled by the rules governing courts of law with reference thereto:" (same case). Also *Lamberts v. Cooper's Ex'ors*, 29 Gratt. 66.

The opinions of unprofessional witnesses in regard to testamentary capacity, without the facts upon which they are based should not be allowed to go in evidence to the jury. See Redfield on Law of Wills, p. 143, § 12, note 20: 2 Greenl. § 691.

The opinions of witnesses in regard to one's competency to do business are entitled to little regard unless supported by good reasons founded on facts which warrant them. Red. Am. Cas. 194; *Kinne v. Kinnie*, 9 Conn. 103.

An appellate court will reverse and remand a cause for want of necessary parties although the point was not raised by demurrer in the court below. *Taylor v. Spindle*, 2 Gratt. 55, 72; *Armentrant's Ex'ors v. Gibbons*, 25 Gratt. 371; *Dabney v. Preston's Adm'r*, 25 Gratt. 838; *McCoy's Ex'r v. McCoy's Devisees et al.*, 9 W. Va. 443.

A jurymen should not be allowed to discuss with outside parties the manner of witnesses who have testified before them, or the weight and character of the evidence during the progress of the trial. See *Vanmetre v. Kitzmiller*, 5 W. Va. 380.

Before the issue *devisavit vel non* will be directed by the court, the parties requiring it must show themselves entitled to an interest in the result of the issue. See Code ch. 78, § 28.

A sentence pronounced by a court having jurisdiction, whether it be a sentence admitting a paper to probate, or excluding it from probate, so long as it remains in force binds conclusively, not only the immediate parties to the proceedings in which the sentence is had, but all other persons, &c. See *Connelly v. Connelly et al.*, 32 Gratt. 657.

Smith & Knight for appellants.

Charles E. Hogg for appellees:

The issue in this case follows the language of the statute and this is sufficient. *Culter's Ex'ors et al. v. Bryan and wife et al.*, 1 Gratt. 19.

The law requiring the heir to be made a party to a suit to establish a will must be, it seems to me, where an interest is asserted in direct conflict with his interest as the legal representative of the testator. 1 Danl. Chy. Prac. (4th ed.) 232.

Applicants have not been injured by the omission of the heir at law of decedent as parties to plaintiff's bill, wherefore the court will not disturb the decree complained of. *Vance v. McLaughlin's Adm'r.*, 8 Gratt. 289.

Objection for want of parties obviated by court refusing relief asked for against the heirs at law of decedent. 1 Danl. Chy. Prac. (4th ed.) 292, 294.

Witness may give his opinion as to testator's mental condition based upon what he saw of testator immediately before after and the execution of the instrument written in 1876. 2 Whar. Dig. 485; 11 Serg. and R. 141; *Jarrett et al. v. Jarrett et al.*, 11 W. Va. 585; Redf. Am. Cas. on Wills, 53, 68, 69, 89, 93, 140 *et seq.*

Witness may give his impression as to state of affection of testator toward one claiming to be object of his bounty. 1 Greenl. Ev. (Redf. Ed.) § 440.

Court ought not to disturb the verdict of the jury, for technical errors in the admission or rejection of testimony, this cause differing, in this regard, from an ordinary proceeding at law. *Henry v. Davis*, 7 W. Va. 720; *Baker v. Ray*, 2 Russ. Rep.

The mere conversation of a juryman *per se* will not be sufficient to have the court order a new trial. The correct

rule on this point now is that there must be some manifest influence shown to the prejudice of a party who seeks to set aside the verdict. 1 Am. Dec. 27 note; *Gunnell v. Phillips*, 1 Mass. 530; *People v. Boggs*, 20 Cal. 432; *Jackson v. Jackson*, 32 Ga. 325; *Perkins v. Knight*, 2 N. H. 474; *Nesmith v. Ins. Co.*, 8 How. Pr. 141.

Where the misbehavior of a jury is known before the jury retires by party seeking to set aside verdict and same is not disclosed to court before verdict is rendered, the verdict will not be disturbed on that ground. *Pettibone v. Phelps*, 13 Conn. 445; *Stewart v. Small*, 5 Miss. 525; *Fessenden v. Sager*, 53 Me. 531; *Jackson v. Jackson*, 32 Ga. 325; *Martin v. Tidwell*, 36 Ga. 332.

Where after discovered evidence is merely cumulative court will not disturb the verdict. 16 Am. Dec. 729; 17 Am. Dec. 349; 18 Am. Dec. 503; 12 W. Va. 23.

Court will not disturb verdict where evidence is conflicting. 7 W. Va. 665, 715.

As to the unreasonableness of the provisions of the will being considered an evidence of fraud and undue influence in its execution. See Redf. Am. Cas. on Wills, 297, 326, 347, 627 733, 751; Redf. on Wills, 516.

Henry J. Fisher, jr., for appellees:

The necessary parties to a suit in equity are those whose presence before the court is necessary to a complete judgment with respect to the interests involved under the issues raised by the pleadings. *Vide: Green v. Milbanks*, 5 Abb. New Cas. 183; *Holly v. Van Dusen*, 55 How. Prac. 333.

No one need be made a party complainant, in whom there exists no interest, and no one a party defendant from whom nothing is demanded. *Vide: Kerr v. Watts*, 6 Wheat. 550-559; *Story v. Livingston*, 13 Pet. 359; 1 Pet. 299; 14 Wall. 314.

Necessary and indispensable parties are those whose interests will be detrimentally affected by any decree, which can be made. Those whose interests are separate from those before the court are not necessary parties. *Vide: Mit. & Tyl. Pl. and Pr.* 20, 21; 1 McAll. 31, 37.

When a statute prescribes what an issue shall be, and an

issue is directed in the words of that statute, it is enough. *Vide: Coulter's Executors et al. v. Bryan and wife et al.*, 1 Gratt. 19.

Where a court of chancery is resorted to for the purpose of setting up a lost instrument, the rules of that court are applicable, and all persons materially interested in the subject matter, or who will be directly affected by the decree, are necessary parties. *Vide: Mitchell, Sheriff, v. Chancellor et al.*, 14 W. Va. 22.

A new trial asked for on the ground that the verdict is contrary to the evidence, will be granted only in a case of plain deviation from right and justice, not in a doubtful case. *Vide: Henry v. Davis*, 7 W. Va. 720; *Miller et al. v. Insurance Co.*, 12 W. Va. 116.

A verdict will not be set aside upon the evidence of some of the jurors that they had been induced to agree thereto under a misapprehension of the instruction of the court, if the verdict is in all respects fair, and in the opinion of the judge, who tried the case, in conformity with the evidence. *Vide: Harnsbarger's Adm'r v. Kinney*, 6 Gratt. 287.

Affidavits of jurors are not receivable to impeach their verdict, but they may be read in support of it. *Vide: Dana v. Tucker*, 1 City H. Rec. 121; *People v. Barbour*, 2 Wh. Cr. Ca. 19; *Clum v. Smith*, 5 Hill 560; *Brownell v. McEwen*, 5 Den. 367; *Haun v. Wilson*, 28 Ind. 296; *Dana v. Tucker*, 4 Johns. 487; *Messenger v. Nat'l Bank*, 7 Dana 581.

When a jury is tampered with by a party to the action, his friend, or agent, then a new trial must be granted. *Vide: Perkins v. Knight*, 4 N. C. 474; 1 Strob. 410; 6 N. H. 352.

When the interference with the jury comes from a stranger, a different rule prevails. *Vide: 2 Gra. & Wat. on New Trials* 309. The brother-in-law of a party to an action holding conversations with a juror before and after he was sworn; the persons conducting the suit being charged with no misconduct, *held*, not a good ground for new trial. *Vide: Opinion of Yeates, J., in Blain v. Chambers*, 1 Serg. & R. 169.

If the misconduct of a juror is known before the close of the trial, the objection must be made then and not after a verdict. *Vide: Sleight v. Hemming*, 12 Mich. 371; *Fessenden v. Sager*, 53 Me. 531; *Pettibone v. Phelps et al.*, 13 Conn. 445; *Martin v. Tidwell*, 36 Ga. 332; *Jackson v. Jackson*, 32 Ga.

325; *Stewart v. Small*, 5 Miss. 525; and a failure to do so is a complete waiver of the objection.

An issue directed in either of the modes suggested by counsel for defendants and appellants in their argument of errors, on page 5, printed record, would be bad under the ruling in the case of *Schultz v. Schultz et al.*, 10 Gratt. 376.

A plaintiff is required to make all proper parties; if he fail to do so, it is too late for him in the appellate court to take advantage of his own omission for the purpose of reversing a decree which is proper and correct in other respects. *Vide: Kincheloe v. Kincheloe*, 11 Leigh 398.

Upon the same principle it was equally the duty of counsel on both sides to have the issue in this case properly directed, and to draw it properly when directed; and if they fail to do so, it is likewise too late to take advantage of it in an appellate court.

GREEN, JUDGE, furnishes the following statement of the case:

John J. Weaver, was married December 29, 1829, and lived with his wife till his death, January 15, 1876. He never had any children by her, but after he had been married some twenty years, he had habitually illicit intercourse with one Anna Maria Weaver. In 1850, while such illicit intercourse existed, she had a daughter, Anna Eliza. There was some uncertainty as to who was the father of this child, but it was believed by John J. Weaver, not to be his child, but the child of one McFarland, who was also having illicit intercourse with the mother at the same time. She states, that it was McFarland's child. But from its early infancy, when not more than six months old, it was taken by John J. Weaver to his home, and she was there reared by him and his wife, till she attained the age of seventeen, when she married George A. Church. She was married by the name of Anna Eliza McFarland. About a year or eighteen months after the birth of this child, Anna Maria Weaver gave birth to another daughter, Maria Teresa. She was born at the home of John J. Weaver, and he always admitted, that she was his child. She never lived with John J. Wea-

ver, but with her mother and married about the same time that her sister did. She married Patrick Dower, and her name is stated in the marriage license to be Maria Teresa Weaver.

These marriages took place in 1867, and each of them met the approval of John J. Weaver. Shortly after their marriage in the autumn of 1868, John J. Weaver, having received a fall from a wagon by which he was injured, made his will whereby he gave all his property real and personal to his wife Angelina, for life, remainder to Maria Teresa Dower and Anna Eliza Church and their heirs, to be equally divided between them.

When he died July 15, 1876, he owned real estate worth from forty-five thousand to fifty thousand dollars; and personal estate from two thousand to three thousand dollars. John J. Weaver was a resolute man, and one whom it was difficult for any one to influence, when he had once made up his mind. He was an uneducated man, rarely writing more than the mere signing of his name. His wife Angelina knew of the contents of this will made in 1868, as did a number of other persons; John J. Weaver, frequently speaking to others of how he had by his will disposed of his property. His wife was never satisfied with it. She did not want Teresa Dower, to have any portion of the estate of her father John J. Weaver. She desired after her death, that it should go to Anna Eliza, afterwards Mrs. Church, who had been raised by her.

After the marriage of Maria Teresa to Patrick Dower, he kept a saloon. This his wife's father John J. Weaver, disapproved of; and on a number of occasions said, if he did not give up selling whisky he would furnish him with no more help, and he would not give his wife any of his property. He did give up keeping a saloon, but while John J. Weaver thus spoke, he did not destroy his will or make any change in it. But continued up to within two or three weeks of his death, to speak of this will as one that suited him, and one which he would not change. There is no direct evidence that his wife endeavored to use her influence with him, though it is proven, that she at one time asked a third person to use his influence with her husband to get him to change

this will. If she did not make the effort to to get this will changed, before the few weeks preceding her husband's death, it must have been because she knew she could not influence him to change it for it is well proven, that she did not like the provision in it by which Maria Teresa Dower, was provided for, and that too equally with Ann Eliza Church, who had been raised by her.

In 1875 John J. Weaver, was afflicted with a cancer in his stomach, and about the close of this year this affliction was regarded as dangerous, threatening to destroy his life. And from January 1, 1876, till his death on January 15, 1876, he was confined to his room and bed, and suffered great agony. Up to this time and even afterwards, he continued to speak of this will of 1868, as satisfactory to him and he sent for his daughter, Maria Teresa Dower, to come with her children to see him, which she did on three several occasions during his sickness. The latest declaration by John J. Weaver, or his being satisfied with this will of 1868, was on January 5, 1876, when he so told his sister. But about this time the physicians attending him, commenced administering to him morphine both in powders and hyperdermic injections. The effect of this medicine was to relieve the intense pain from which he was suffering. This cancer in his stomach also produced stupor and affected his mind. To what extent his mind was affected by it and the taking of morphine, it is difficult to say; but within less than a week after he commenced taking it he signed a will, whereby he gave all his property to his wife for life, and after her death to Ann Eliza Church, the wife of George Church, and her children. The will making no mention of his daughter Maria Teresa Dower, to whom after the death of his wife, he gave one-half of his property by this will of 1868. This will was dated January 9, 1876, and he died January 15, 1876, and the will was admitted to probate by the county court of Mason on January 24, 1876, having been presented by the executrix in it, his widow, and proved by the attesting witnesses J. C. Brinker, a nephew of the testator, and L. H. Bridgeman, the latter being the writer of the will.

On May 26, 1877, Teresa Dower and her husband Patrick Dower, and their six infant children instituted a chancery

suit in the circuit court of Mason county, against Ann Eliza Church and her husband George Church, Angelina Seeds, late Angelina Weaver, and her husband James M. Seeds, she having married him after the death of her husband John J. Weaver, and the four infant children of said Ann Eliza Church and George Church. The object of this suit was to have the paper dated January 9, 1876, and admitted to probate by the county court of Mason on January 24, 1876, as the will of John J. Weaver, declared not to be his will, and the probate thereof annulled, and the bill also asked, that the will made in 1868 might be set up and established as the last will and testament of John J. Weaver, and alleged that it was lost or destroyed. All the defendants answer this bill; the infants by their guardian *ad litem*. Angelina Seeds, admits the due execution of the will of 1868, and that its contents were such as was stated in the bill; but she denies that it was the last will of her husband John J. Weaver, but says the will he executed on January 9, 1876, was his last will, and that he was when he executed it competent to make his will and that the will of 1868 was destroyed by his direction. She also says "she never directly or indirectly in any way influenced, or tried to influence the mind of her said husband in making or changing any will whatever by him, at any time made. And, that she was at all times well satisfied to let the will of her husband, whatever it might be, have its effect in the final disposition of the estate after her death."

The answers of the other defendants, while they did not deny the due and legal execution of the will of 1868 or its contents as stated in the bill, did not admit the same, but said they knew nothing of it and required full proof. And they state, that the last will was made when the testator was of sound mind and disposing memory. Some depositions were taken to prove, that the said John J. Weaver, was not of sound mind and disposing memory when the paper of January 9, 1876, was executed; and the court then on this bill, answers and replications to them, and these depositions, the plaintiffs asking it, on October 16, 1877, decreed, "that an issue be tried before a jury at the bar of this court to ascertain, whether any and if any how much of the paper probated by the county court of Mason county, West Virginia,

on the 24th day of January, 1876, was the will of John J. Weaver, deceased."

Subsequent to this decree, some depositions were taken to prove the due execution of the will of 1868, and its contents. After these depositions were taken, on October 9, 1879, a jury was sworn to try this issue; the trial of the case lasted about a week, and on October 16, 1879, the jury rendered this verdict, "that the paper writing purporting to be the last will of John J. Weaver, deceased, and probated in the county court of Mason county, West Virginia, on the 24th day of January, 1876, was not nor was any part thereof the will of John J. Weaver, deceased." Affidavits of a number of persons were then filed by the defendants to show, that one of the jurors had misconducted himself; and counter affidavits of other parties were filed by the plaintiffs, to disprove this charge.

The affidavits prove, that pending the trial one of the jurors, while going on foot to a place a few miles from the court house, was overtaken by a stranger in a one-horse buggy; he invited him to get in the buggy with him, not knowing he was a juryman. The juryman got in the buggy with him and rode on his route about three miles. While thus traveling Dr. A. L. Knight, who had been a witness for the plaintiffs in this cause on the trial of the issue, overtook this buggy and drove along behind, both buggies being driven at a brisk trot. Dr. Knight was a stranger in the community, and did not know the juryman or, that the man in the other buggy was a juryman. Dr. Knight drove behind the buggy for a quarter or a half mile, and during that time he entered into a conversation with the stranger in the buggy before him; and during this conversation, Dr. Knight asked the stranger what he thought of the evidence in the will case? The stranger said he had not heard all the evidence, and would like to have heard all that one witness, meaning him, had said. Dr. Knight said, he thought it strange they did not give J. J. Weaver, more than one dose of morphine on the 9th day of January, 1876, when days previous when he was there, more had been given. Dr. Knight then said something about one of the witnesses to this will stultifying himself, or contradicting himself. This

was all the conversation that occurred between the stranger and Dr. Knight. And no conversation occurred between the juror and Dr. Knight. The stranger says, the juror said to him, "that this witness spoken of wanted to come back and explain, but they would not let him, and that he had been contradicted by two witnesses. He also said, he thought he knew how the jury stood. To this, the stranger says he made no reply, as he was listening to Dr. Knight. He then asked the juror a question, which he does not remember, and he told him he was a juror. He replied, "the devil you are," and expressed the hope, that what he had said would not influence him. Nothing more was said.

The juror says, that all that he heard passing between the stranger and Dr. Knight, was he thought in reference to what one of the experts had said, but he did not fully understand what was said, and as soon as he was convinced they were talking about this trial, he told the stranger that he was a juror, and he said nothing more. Dr. Knight made a remark or two more, which the juror says he did not understand, and by that time he had reached the place where he wanted to quit the buggy and go across the fields to the place he was going to, and he did there quit the buggy. He says, "that the accidental hearing of these remarks did not make any impression on his mind, and did not influence him in the least in the rendering of the verdict."

One of the plaintiffs' counsel in his affidavit states, that pending the trial and before the case was submitted to the jury or they had retired, he went to one of the defendants' counsel having heard, that he knew something of some juror having talked to some one on the matters before the jury, and asked him the truth about the matter. He declined to let him know anything about it, saying he would learn it soon enough. The defendants' counsel referred to denies, that he ever had such a conversation or any conversation with this plaintiffs' counsel on this subject, but he admits, that on October 14, 1879, the day before this case was submitted to the jury, he heard of some conversation having occurred between this stranger, giving his name as Dr. Knight, and one of the jury, in regard to the evidence in the case. He told his informant, that he did not believe it, as these gentlemen were both men of honor.

On 15th of October, 1879, he saw this stranger, who told him all that had passed, except he told him he thought the juror's name was Rice. He examined the jury list and found no such name on the jury, and he did not know who the juryman was till after the verdict was rendered. This information was also communicated to the other counsel for the defendant together with what was said, but the juror's name was given to him too as Rice.

On the 16th of October, the day after the case was submitted to the jury, this stranger pointed out the juryman to one of the defendants. One of the plaintiffs' counsel also stated, that the stranger in his presence and in the presence of the juryman stated, what had passed, and the juryman made no denial of it or any objection to his statement. One of the defendants George W. Church, also made an affidavit, that the duty devolved on him to prepare the cases for his wife and children, and since the verdict he had discovered two witnesses, who would have been very material witnesses for them at the trial. One of them would prove, that some three or four years before January 9, 1876, he heard J. J. Weaver say, "that Pat Dower had gone over to Antiquity against his wishes, and was selling whisky there; and he did not intend to give him or his wife anything. If he gave his wife anything it would be the same as giving it to Pat, as he would get it from her." This is substantially confirmed by the affidavit of this witness, but he states he knew George W. Church intimately and had many dealings with him since 1868, and saw him frequently during the trial, as he was attending the court as a juror in another cause.

The other newly discovered witness, Blackmore, would prove, that he was a blacksmith living in Ohio, and on the 11th or 12th day of January, 1876, he went to John Weaver's house to collect a bill; that Weaver recognized him and collected the exact amount he owed him, and directed his wife to pay him, and that he would state he thought him of sound mind and disposing memory. He learned he could prove this by this witness too late to have him at the trial.

The evidence before the jury on the trial of that issue in this case proved all the facts I have hereinbefore stated,

The testimony as to the state of mind of John J. Weaver, on the 9th day of January, 1876, is very conflicting.

The physician in attendance on J. J. Weaver, at the time of his death proved, that he commenced attending him about December 15, 1875, and he died on January 15, 1876, of cancer of the stomach. Dr. Knight was called in as consulting physician, some two weeks or more before his death. After Dr. Knight's second visit, the regular physician concluded to give him morphia. We gave him about one-fifth of a grain and it seemed to do him good, and after that the treatment by morphia was continued. When he administered it, he did so by hyperdermic injection, and he left powders of about one-sixth of a grain each, to be given when necessary to allay the distress and burning in the stomach. He commenced this about ten or twelve days before his death. This would be from four to six days before the will was made. Some times two doses were given in the twenty-four hours, but generally one. No fixed times were prescribed for giving it, but it was to be given as required to ease pain. It produced calmness, quietness and cheerfulness. He staid all night at his house at his request on January 8th, and went into his room the morning of January 9th, about daylight. He told him then he wanted to change his will, and wanted him to write it. He said, that he had better get some one else, and he asked if one Mitchel would do and the doctor said he thought he would. He said then he would send Church for him. The doctor then gave him a dose of morphia of from one-sixth to one-fourth of a grain by hyperdermic injection. This was about a quarter past seven. He talked rationally, and he thought him then of sound and disposing mind and memory. He saw him that day about dusk. The doctor spoke to him about writing his will and he said he had had it written; that Mr. Bridgeman had written it for him. He knew of no morphia given that day, except what he had given in the morning, but the powders of morphia had been left with the usual directions. Mr. Binder was the nurse with whom he left powders to be given when needed. He gave rational answer that evening to the questions he asked, and he thought him then of sound mind and he continued so till three or four days before his death; that in his judgment the

morphia he gave in the morning, would not produce any aberration of mind at four o'clock in the evening. He left three or four morphia powders at a time, containing by estimation not weighed, a fourth or a fifth of a grain.

Cancer of the stomach principally affects the stomach, but also affects the brain. One-eighth of a grain of morphia might affect the breathing, but not cause stentorian breathing. The long continued use of it would produce perverted will power; but not in the doses and for the time it was given him. Dr. Knight on the other hand says, they misunderstood the disease till January 4, 1876, and then commenced administering morphine. He saw him again on January 8; he was getting weaker and weaker and he thought his disease fatal, and it was concluded to use morphine more freely. It was given to allay pain in the stomach. He again saw him on the 9th of January at eleven or twelve o'clock at night. He was convinced from his breathing that he was then sleeping from the effects of an anodyne; that both the disease and the treatment weakened both mind and body. It would not destroy the will power, but weaken and pervert it. If kept up for a length of time the mind would be easily influenced, and if the course of treatment prescribed had been carried out, in his opinion, he would not have been competent to make a will on January 9. He was convinced, that the disease was cancer of the stomach on January 8, though the attending physician did not think so then. But after his death a post mortem examination showed, that this was the disease. He never regarded a man with this disease and the treatment he was receiving, as of sound mind. The effects of a dose of morphine however administered of one-sixth of a grain, is supposed to pass away in from three to four hours. Dr. Barbee, as an expert proved, that morphia administered hyperdermically and by powders taken internally for four or five days, would tend to stupefy and weaken the intellectual powers.

According to the statement made by the attending physician, if no more morphia had been given than he stated, his opinion was it would not produce aberration of mind or want of will power when the will was made. Dr. Wm. Way stated, that cancer of the stomach exhausts the nervous sys-

tem, and affects the brain; and that the disease and this use of morphia would necessarily diminish the will power.

Mrs. Young proved, that she lived within two hundred yards of Mr. Weaver. She saw him on the evening of January 9, 1876. He asked if her son-in-law Mr. Bridgman, was at her home; and asked her to go over for him. She did so; when he came in his room he said, "I want you to write me a little will." He said any one could write a will; he only wanted a short one; and he wanted all he had written null and void. He then ordered a table to be brought and set by his bed, and told John Briggs, to get the paper and ink. He said he did not want her any longer and she then left the room; and every one else went out, but Bridgman. He was not drowsy and his conversation was rational. She did not introduce Bridgman to Mr. Weaver.

These statements were confirmed by Bridgman. He says, he dictated the parties to whom he desired his property to go, and the disposition he desired to be made of it. And it was drawn accordingly. He said he wanted his wife to keep the property together and for it to go to Church's children at her death. He said he wanted to make all former wills null and void. He named some of Mrs. Church's children, and the scribe says, he suggested she might have other children, and he said leave it to Mrs. Church and her children.

After the will was drawn he said, "have John Brinker come in and you and him witness it. Mr. Weaver, while discussing the witnessing of the will said, that the first will he had made was drawn by a lawyer at Point Pleasant; that another lawyer was called in to witness it, who wanted to read the will before signing it, and the writer of the will told him, that it was none of his business what was in the will; and all he wanted him to do was to witness the signature. He insisted on sitting up and signing the will, and gave as a reason, that he did not want it said he did not have the strength to sign a will; and he then sitting up signed it. And it was then signed by him and John Brinker, as witnesses in his presence and the presence of each other. When he started the will, the writer spoke of its being Sunday and Mr. Weaver smiled and said, that would make no difference; and said he once sued on a note dated on Sunday and recov-

ered the amount. He told him to keep the will in his possession until called for, and he did so till it was admitted to probate.

John Brinker, the other witness to this will, was a nephew of Mr. Weaver and attended on him for three or four weeks before his death, and gave him his medicines. He was dressed every day up to within three days of his death, and was out in the yard three days before his death. He gave Mr. Weaver no medicine on the 9th of January. He was somewhat drowsy the fore part of that day, but not after three o'clock. Church had gone after Mr. Mitchel, and he was not at home. He makes substantially the same statement as Mrs. Young and Bridgman, as to what occurred before they all left the room but Bridgman. He was called back in about fifteen minutes. He said he was not a fit witness, as he was a relative. Mr. Weaver said, that made no difference; that he would do as well as anybody. He gives the same statement as Bridgman, about signiug the will and in nearly the same language, and makes a like statement about what Mr. Weaver said, about Sunday; that on that evening Mr. Weaver told him to wind up the clock, that he Weaver was in the habit of winding up the clock on Sunday evening. The witness wound the clock with two turns of the key; and Mr. Weaver told him to give it two turns more, which he did and Mr. Weaver said, that will do and then he stopped. He denied telling Henry Rausch, that the will could be broken and was not finished, or telling Sallie Knapp, Mr. Weaver's sister, that he did not hear the will read and did not know what it was. He said no morphine powders were to his knowledge administered to Mr. Weaver, that day though they were there lying on the table.

These witnesses and John Briggs all testify, that the testator was in their opinion of sound mind and disposing memory. John Brinker, one of the attesting witnesses, also proved, that Mr. Weaver told him just before or just after this will was written, that he never intended to give Pat Dower or his wife anything, and he did not know what they were hanging around there for. But it was proven by Raush, that he said after Mr. Weaver dies, we heirs will try and break this will. Two other witnesses also proved,

that he said that his aunt Mrs. Weaver, would find this will business the worst day's work she ever done. Mrs. Weaver, now Mrs. Angelina Seeds, in her deposition proves, that her husband J. J. Weaver was confined to his bed for ten days before his death. Heard him tell Church about noon January 9, 1868, he wanted to make another will, and asked him to go after Mr. Mitchel to write it. He went and on his return, told him he was not at home. Mr. Weaver said to him, never mind the doctor will be here directly and he can write it. She makes then the same statement about what passed between Mrs. Weaver and Mrs. Young, that she does. After the will was wrtitten she told her of it and told her to burn the old will, which she did two or three days afterwards. He never spoke to her about his will till that day. She was satisfied she said with the will he had made in 1868, and never in any way influenced him to have another. They also proved by another witness, that in 1875 Mr. Weaver said Church's children would get all his property.

In opposition to these detailed statements which go strongly to show, that J. J. Weaver was of sound mind and disposing memory on January 9, 1876, there are the statements of numerous witnesses, who represent his condition that day as so different, that the jury could hardly credit these statements, at least in all their details, without discrediting the statements of numerous other witnesses. W. E. Pavell says, that he saw him at two o'clock on Sunday, the 9th day of January, 1876, and he was then evidently delirious and unconscious. He could not answer a question intelligibly. At three or four o'clock, he was quiet in body and mind and conscious; he then seemed rational. This was the only time he ever visited him. Charles Gilkins who lived on the farm then says, he saw him almost every day except on the 9th of January, 1876, when he was told by Briggs and also by Church, the defendant, that he was too sick to be seen. He says, he was not capable of doing business that day he should suppose, judging from what he saw of his condition the day before and the day afterwards, as he was very drowsy and dull.

C. E. Gilkin testified, he saw him on the 9th day of January, 1876. He was flighty, out of his head, and in a great

deal of misery; he was that way all day; they said he was dying. He was there in the afternoon, and that was his condition then. This was a youth about nineteen years old. He states this to have been his condition an hour before the will was written, as well as shortly after. Capt. D. O. Hopkins saw him twice on the 9th of January. On both occasions he was breathing very hard and looking very badly, and seemed much prostrated. He regarded him as at the point of death and on the last occasion asked him, if he knew him. He could not understand the answer, but was told that he said: "Is it Capt. David Hopkins?" He had known him well for forty years. He did not regard him as competent that day to do business. He could not have dictated a will. He seemed to be under the influence of morphine, and his answers were not correct. He would swoon away while the minister was talking to him. Mrs. Weaver said he was under the influence of morphine.

Drucinda Raush saw him at half-past two o'clock, on the 9th of January. He was lying on his bed asleep or dying; Mrs. Weaver said it was not natural sleep, it was from medicine. He awoke once and said, "Oh God!" She staid there two hours till half-past four, he was still asleep or in a stupor and was in her opinion then incompetent to do business; this was about a half hour before the will was written. He was breathing very hard; Mrs. Long felt his hands, and Mrs. Weaver his feet and said they were warm. No one then seemed to think he was dying.

R. Graham proved, that he did not see him on the 9th of January. He went to see him that day; was told, that he could not see him; that noise would disturb him, and that they were going to make a will. He saw him on Monday, the next day, and he was not then able to do any business, and was not from that time till his death.

Hamilton Weaver was there on the porch, when the will was drawn and went into Mr. Weaver's room directly afterwards. He was lying on his bed asleep most of the time he was there. He said something he could not understand. John Brinker the witness to the will said, that what he said was, "that they had given him too big a dose and it made him stupid." He would have gone in sooner, but George A.

Church, said he would rather he would not go in as they were doing some writing. Henry Rush, who lived there stated, that on Monday, the day after the will was written, he breathed very hard and had a nervous twitching; he would sometimes recognize him and sometimes not. He was in very poor condition and so remained, till his death; he waited on him.

Joseph Elliott lived in sight of him, and had known him all his life. He was he says, in the room when Bridgman came in to write the will. Mr. Weaver did not seem to recognize him. The witness judged he was under the influence of medicine, and was suffering a great deal. He heard him muttering, but could not understand what he said; he did not seem able to talk so as to be understood, and this was his condition before and after the will was made. He did not think he was then rational. When he left the room with Mrs. Young, George A. Church, as well as John Brinker, staid in the room; that whether they afterwards went out he did not know. That not long after, he and others wanted to go in; Mrs. Church was in the room and asked them not to come in. He saw through an opening of the curtain, while Bridgman was drawing the will. He got up and shook Mr. Weaver to arouse him. John Brinker was in the room then, and probably Church; he then left the window and saw no more.

Angelina Seeds, who was J. L. Weaver's wife, gives nearly the same statement about what occurred in the room, that Bridgman and Mrs. Young did, first to their all going out except Bridgman, who remained to write the will. She says, when she came back he said to her, Mama I have made another will; Mr. Bridgman has got it; he will give it to you. She asked him what he was going to do with the other one; he said burn it up, burn it up; and she did so several days afterwards. She denies, that she ever had any conversation with her husband about his will, or ever heard anything about it, till the day he made it. She says, she never in any way tried to influence him in making his will, and was satisfied with the will he made in 1868. There is however, an abundance of testimony in the cause to establish as a fact, that she was not and never had been satisfied with

this will made in 1868, and frequently said she wanted it changed, and Teresa Dower left nothing.

A number of depositions were made and exceptions taken, to the reading of certain questions and answers in them; some of which were sustained and others overruled. So far as it is necessary these objections will be noticed in the opinion.

The defendants asked a new trial of the issue, on the ground of newly discovered evidence; because of the misconduct of a juror and on the ground, that it was contrary to the law and the evidence and further, that illegal and incompetent evidence was allowed to go to the jury. But the court overruled the motion, and a bill of exceptions was taken, in which all the evidence is certified and is substantially given above. And the defendants on October 28, 1877, also moved the court to set aside the order, directing the issue as improperly and improvidently awarded, which the court refused to do; and on the 1st day of November, 1879, entered a decree in pursuance of the said verdict and decreed, that the paper writing purporting to be the last will and testament of John J. Weaver, deceased, and probated in the county court of Mason county, West Virginia, on the 24th day of January, 1876, was and is not, nor is any part thereof the will of John J. Weaver, deceased; and the said order probating said will was set aside, annulled and held for naught. From this decree the defendants have appealed to this Court.

GREEN, JUDGE, announced the opinion of the Court:

The first question presented by this record is, whether the circuit court did not err in ordering the issue of *devisavit vel non*, and in entering up a decree based on the verdict of the jury on this issue; because before the ordering of the issue by the court the plaintiffs had not shown, that they were interested in the question, whether the paper dated January 9, 1876, and admitted to probate by the county court of Mason, on the 20th of January, 1876, as the will of John J. Weaver, was or was not his will. This suit was instituted under section 28 chapter 78, of the Code of West Virginia, page 483, which provides, that "after a sentence or order (admitting to probate or refusing to admit to probate, a paper as a will), a person interested, who was not a party to the

proceeding, may, within five years proceed by bill in equity to impeach or establish the will, on which bill, if required by either party, a trial by jury shall be ordered, to ascertain whether any and if any, how much, of what was so offered for probate, be the will of the decedent. If no such bill be filed within that time the sentence or order shall be forever binding."

Neither the plaintiffs in this suit nor the heirs or distributees of the decedent, John J. Weaver, were parties to the proceedings in the county court of Mason, whereby on January 24, 1876, the paper dated January 9, 1876, was admitted to probate as his will. But it is claimed, that the plaintiffs in this cause before the ordering of the issue wholly failed to prove, that they or any of them were persons interested, and therefore under the provisions of law above quoted they had no right to bring this suit in equity to impeach this will of January 9, 1876, and the court ought not to have directed the issue of *devisavit vel non*, nor entered up a decree in accordance with the verdict of the jury, "that said paper writing purporting to be the last will and testament of John J. Weaver, deceased, and probated in the county court of Mason county on the 24th day of January, 1876, was and is not, nor was nor is any part thereof, the will of John J. Weaver, deceased;" and further, that the order probating the same ought to have been set aside, annulled and held for naught.

The question whether the circuit court did right in thus acting as though the plaintiffs in this cause were persons interested, and having a right to such an issue of *devisavit vel non* under this statute, depends for its true solution on the real character of such a suit instituted under this section.

In Virginia they have had and still have a statute, similar to our statute above quoted; and their courts have determined the character of the suit instituted under it, and what can be done by the court in such a suit. Baldwin, Judge, in *Malone's Adm'r et al. v. Hobbs et al.*, 1 Rob. 388; after quoting the Virginia statute says, "that the statute provides a supplemental tribunal to revise the decision of the court of probate, if in favor of the will; and that tribunal is a jury, to be impaneled for trial of the issue of *devisavit vel non*, to be directed by a court of chancery. The jurisdiction, such as it is, so conferred on

the chancery courts, is no part of the original jurisdiction of the courts of equity, which will not (in the language of the books) in an adversary way, take jurisdiction to determine the validity of a will. It is a probate jurisdiction to be exercised not by the chancellor, but by the jury; and its only power, is to convene the proper parties, and to cause the prescribed issue to be made up and tried, with the incidental power to grant a new trial, and to remove impediments and furnish facilities to a full and fair trial of the merits before the jury. The issue is directed by the mandate of the court, in order to the final probate of the will propounded; and not to inform the conscience of the chancellor, whose conscience is not at all concerned in the matter except to prevent injustice being done by the verdict of the jury. The issue is not made up by the bill, answer and other pleadings in the chancery proceedings, but is a new and separate issue * * When the jury are impanelled upon the issue, the parties are then in a legal forum, which looks only to the question which the jury have been sworn to try, without regard to the chancery pleadings. These proceedings cannot enlarge or contract the issue before the jury.

The conclusion reached in this case from this reasoning is, that the bill need not set out as fully the facts on which the plaintiff claims, that the paper which has been probated as the will, is not the will of the decedent, as it would have to do under the general rules governing equity pleadings; but that it will suffice in such a bill to aver in general terms, that the writing of which probate has been received is not the will of decedent."

The general principles here expressed were acted upon in *Coalter's Ex'r et al. v. Bryan and wife et al.*, 1 Gratt. 18. In this case the bill was filed, not only to contest the validity of a will, which had been regularly admitted to probate, but also that the executor and others who had possessed themselves of the estate of the decedent under the will, should account for the same to those entitled to it. The circuit court dismissed the bill as to the executor, and refused to require or permit him or others, to render any account in this suit of the estate which had come into their hands. This was approved by the court of appeals which held, "that the function

of such a suit was exhausted, when the question whether the will was valid or invalid, was decided."

Upon this subject Judge Baldwin says, on page 80, "the most that can be said in behalf of the ulterior relief sought by the plaintiff is, that the court of chancery having obtained jurisdiction of the subject, for the purpose of deciding on the validity of the instrument, it ought to go on to administer complete justice between the parties, instead of turning them around to another action whether in the same or a different forum. But this is founded on the supposition, that the court of chancery has obtained jurisdiction of the subject as a court of equity. Such however is not the fact; its jurisdiction is merely that of probate; and to be exercised not by the court but by a jury under its supervision, and for the decision of a common law issue affecting the legal rights of the parties. Besides, the ulterior jurisdiction claimed for the court of chancery, is not founded upon the circumstances existing at the institution of the suit, but merely prospective and contingent."

In the case now before us for example the question, whether the paper executed in 1868 was the will of the decedent, could not properly arise till it has been first decided, that the paper executed in 1876, was not the will of the decedent. That is till this suit proper was terminated.

These views are again approved in *Lamberts v. Cooper's Ex'ors et al.*, 29 Gratt. 66; in which it was held, that the mode of proceeding upon the trial of an issue of *devisavit vel non*, is substantially the same as in the trial of common law actions. Bills of exceptions are taken in like manner, and a new trial awarded or refused by the court on the same principles, which would govern a common law court in granting or refusing such new trial. And this Court, on appeal from the circuit court, in refusing to grant such new trial, would be governed by the same principles, that would govern them in a writ of error to a judgment in a common law suit, refusing to grant a new trial.

These views, may be perhaps regarded as to some extent, qualified by the decision in *Connolly v. Connolly et al.*, 32 Gratt. p. 657; it is there held, that "a court in which, a bill is filed under the statute to impeach or establish a will is not

a mere court of probate, but something more. It is a court of equity, and though its powers over the subject confided to it are limited it may on a proper bill, review or correct errors in its proceedings upon final decree in the cause." But Moncure, President, dissented from the opinion and decision in this case. This case also decided, that a decree establishing or rejecting a bill in a case of this description, so long as it remains in force, binds conclusively not only the immediate parties to the proceeding in which such decree is rendered, but all other persons and all other courts.

But it was decided in this case, as in the case of *Singleton v. Singleton et al.*, 8 B. Monroe 340, 345; "that if in such a chancery suit the jury on the issue of *devisavit vel non* should find that the paper writing purporting to be the will of the testator, was not the will of the testator, a legatee or devisee in such supposed will, who was not made a party in the chancery suit, could file a bill in the nature of a bill of review to review the decree adjudging, that such paper was not the will of the decedent, and have the issue again tried; or if he was an heir or distributee who had not been made a party, and the decree was in favor of the will, such heir or devisee could have the case reviewed by a bill in the nature of a bill of review, and the issue of *devisavit vel non* again tried." But in the case of *Connolly v. Connolly et al.*, the majority of the court expressly approve the Virginia cases I have cited; but they regard the language used by the judges rather too general, in speaking of the chancery court in such cases as only a court of probate.

From these decisions it seems to me clear, that the court in this case directed the proper issue to be tried, that is, "to ascertain whether any, and if any, how much of the paper probated in the county court of Mason county, West Virginia, on the 24th day of January, 1876, was the will of John J. Weaver deceased." This is the issue which the statute required to be tried by the jury. And it can as we have seen, neither be enlarged or restricted by the pleadings in this case. It would have been an error in the circuit court to have directed the trial of such an issue, as the appellants now in this Court insist it should have directed; that is, "how much if any of the two instruments named in the

bill as executed by John J. Weaver, was and is his will." As we have seen, the court had no authority in that case, to do more than to have determined by a jury under its supervision, the single question whether the paper, which had been probated was or was not the will of the deceased; and then to render its decision accordingly.

But it is claimed, that it had no authority to direct such an issue, till the plaintiffs had proved themselves interested in the question by proving the will of 1868, under which they claimed. This is a strange position. If they had been required to prove this it would obviously have been the duty of the court, at the instance of any of the parties, to have proved it in the manner, which the law requires; that is by a verdict of a jury that the will of J. J. Weaver of 1868, was made when he was of disposing mind and memory, and was executed and witnessed in the manner required by law. And thus instead of only one question to be decided by the jury, under the direction of the court as required by the statute, another question of like character and difficulty, would have to be decided in like manner by a jury and the court. This would be as we have seen, an obvious violation of the statute.

But it may be asked, can any one by setting up a pretended claim in the bill utterly unfounded, contest in this way any will, though the plaintiffs have no real interest in the question, whether it be or be not the will of the decedent?

I answer they cannot; for at the instance of the defendants, the court would issue a rule against the plaintiffs to show cause why their bill should not be dismissed, because they were abusing the process of the court in a matter in which they had no *bona fide* claim of or to any interest. And if on the trial of such rule by the court without any intervention of a jury it appeared, that the plaintiffs had no claim or pretense of claim, to any interest in the subject of controversy named in the bill, then their suit would be dismissed.

But the enquiry in this case on such a rule would not have been, whether John J. Weaver was competent in 1868, to make a will and did make such a will, as stated in the bill, but simply whether the plaintiff set up a *bona fide* claim, that such a will had been made. On such a rule in this case, the affidavit of the widow of John J. Weaver, to the facts stated

in her answer would alone have been ample to prove, that the claim of the plaintiffs to an interest in the question in controversy in the cause, was obviously *bona fide*; and the rule would have been dismissed.

The next enquiry is, should this Court reverse the decree of the circuit court of November 1, 1879, because the issue had been prematurely and improperly awarded, as the heirs of John J. Weaver, had not been made parties to the cause? They were certainly interested in the question, and ought properly to have been parties. Their proper position in the cause was that of plaintiffs; but as one at least of them could not have occupied such a position, he being a witness to the will, he or any other of them who refused to join as plaintiffs, should have been made defendants. So that all interested should be finally bound by the decree of the court in the case.

Not being parties they would not have been finally bound by a decree setting up this as the last will of John J. Weaver, but could after that have filed a bill in the nature of a bill of review, as a review of the case and have obtained another trial of the same issue by a jury. Though they would have been bound by such a decree as *res adjudicata*, till and unless it was thus reviewed and set aside. See *Connolly v. Connolly et al.*, 32 Gratt. 657 and *Singleton v. Singleton et al.*, 8 B. Monroe 340. But the reasons assigned in these cases for allowing a new trial of this issue to such heirs, if the first verdict and decree had been against their interest show, that no such new trial would for such reason be granted to the devisees in the will, if the jury found against them and they were parties to the suit as in this case.

Judge Burk, in delivering the opinion of the court in the Virginia case, 32 Gratt. p. 666, says: "Is it possible that the law provides no remedy; gives no relief in such a case. Are parties to be forever barred of their rights without being heard or having an opportunity of being heard?" We think not. As is said by Judge Christian, in *Underwood v. McVeigh*, 23 Gratt. 409, 418, "it is of the very foundations of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in his

defense." Or as Chief Justice Marshall said in the Kentucky case, 8 B. Monroe 345, 346: "We take it to be an indisputable principle, essentially inherent in every enlightened system of jurisprudence, that every person who is bound by a proceeding to which he is no party, and had no opportunity of becoming a party or of making a defense, and in which he is unrepresented must, if he had such interest in the subject as required or authorized him to to be made a party, be entitled to some mode of reviewing the same." See also *Renick v. Ludington*, 20 W. Va. p. 511.

But as the defendants have had "the opportunity of being heard in their defense," by such reviewing they ought not to be again permitted to try this issue over. They have already fully availed themselves of this opportunity, being represented by able counsel in the trial of this issue, which lasted six days. If they had wished to bind the heirs of J. J. Weaver, by the decision in this cause, they should have demurred to the bill or in their answers should have claimed, that they should be made parties to the cause before the issue of *devisavit vel non* was tried. They did neither, because I presume they felt satisfied, that if this was found to be the true last will of John J. Weaver, that his heirs would abide by the result.

The want of proper parties is always a good ground of demurrer, and it has been frequently laid down by the courts in very broad language, "that all persons materially interested in the subject of controversy ought to be made parties in equity; and if they are not the defect may be taken advantage of by demurrer or *by the court at the hearing*." And also, "that where such defect is apparent on the face of the records, although the bill can not be demurred to in the court below nor the defect noticed by the court at the hearing, it will be noticed by the court at the hearing in the appellate court and the decree reversed for that cause. See *Dabney v. Preston's Adm'r*, 25 Gratt. 841; *Armintrout v. Gibbons*, 25 Gratt. 371; *Sillings v. Bumgardner*, 9 Gratt. 273, 275; *Richardson's Ex'or v. Hunt*, 2 Munf. 148; *Sheppard's Ex'or v. Starke and wife*, 3 Munf. 29; *McCoy's Ex'or v. McCoy's Devises*, 9 W. Va. 443; *Lyman v. Thompson*, 11 W. Va. 427.

But these propositions are certainly not universally true.

It is certainly a very important principle of a court of equity, that it ought not to dispose of any case by settling its principles or rendering a final decree in it, when any party materially interested in the subject of controversy is not before the court. This is a fundamental principle in courts of equity, and its observance is generally essential in order to avoid great trouble as well as to administer justice with uniformity, and to avoid conflicting decisions.

The necessity for the observance of this principle to avoid such confusion, injustice and delay, is well illustrated by the case of *Renick v. Luddington*, 20 W. Va. 511. But nevertheless, the principle is not of universal application; in that very case this Court did not apply it to its full extent. They did not reverse in *toto* decrees rendered by the court below, though persons who were interested in the subject-matter had not been, as they ought to have been made parties defendants. No demurrer had been filed in this cause on this account, nor had any objection been made by reason of this defect at the hearing; yet this Court did not reverse in *toto* the decrees of the court below, but only reversed such portion of these decrees as were prejudicial to the interest of those persons, who had not, but ought to have been made parties defendant. So too in *Swann v. Seldon*, and unreported case cited in *Kincheloe v. Kincheloe*, 11 Leigh 398; the court decided, that the decree dismissing the bill on the merits ought not to be reversed on an appeal taken by the plaintiff merely on the ground, that persons interested in the subject of controversy were not made parties. This decision was followed by this Court in *Mitchell v. Chancellor*, 14 W. Va. 22. See also *Jameson's Adm'r v. Deshields*, 3 Gratt. 13. Perhaps the ground of this decision was, that the appellant the plaintiff, was not prejudiced by the decree; it being right on the merits of the case. See *Vance v. McLaughlin's Adm'r*, 8 Gratt. 289. But some courts have gone further. Thus in *Chambers v. Robbins*, 28 Conn. 555, the court say, "Again it is said this case ought to stand over, that Mills and wife might be brought in and made parties to it. It may be admitted this would have been the proper course if the suggestion had been made at the proper stage of the proceedings. But no such objections appear to have

been made in the superior court, and we think it is too late now to take it by way of suggestion and argument in this Court. No decree is asked against them, and their rights are such as do not affect the defendant. They are in a position antagonistic to the defendant, and not being parties their own rights are preserved, and if the defendant wished the controversy settled in respect to them, he might at an earlier day have caused them to be brought before the court. It does not appear to us that the purposes of justice will be subserved by postponing the case for want of parties." See also *Ferguson v. Fish*, 28 Conn. 501.

Some of these cases and especially the two last, it may be difficult to reconcile with the other cases we have cited, laying down the general principles we have stated. But we apprehend, that to these general principles which are sound, it will be found there are some exceptions, which it may be difficult to define. And we do not deem it necessary for reasons we will presently state, that it should be done by us in this case.

In the case of *Kincheloe v. Kincheloe*, 11 Leigh 398, the suit was one similar to the one before us; the jury however rendered a verdict in favor of the will, but the plaintiff as in this case had failed to make the proper parties to the suit, and the court below thereupon after the verdict had been rendered, instead of entering a decree in accordance with the verdict, dismissed the bill for want of the proper parties defendant. The court of appeals were of opinion, that if the verdict had been a proper one such as on its merits ought not to have been set aside, the court below ought to have entered up a decree in accordance with it; but as the court below had improperly excluded certain evidence, the appellate court set aside the verdict and remanded the cause for further proceedings; directing the proper parties to be made defendants.

In this opinion Judges Cabell and Stanard concurred. Judge Tucker dissented; being of opinion, that even if the verdict of the jury had been unexceptionable, no decree could have been rendered in accordance with it, because of the absence of the proper parties; they not having been made defendants. He says page 400, "No decree could properly be pronounced affirming the validity of a will, unless all persons concerned in interest were before the court. For the

will can not be good against one and void as to others. Nor can a verdict and decree against one bind the others. The other heirs might therefore file their bills, and on the trial of the issue it might be found against the will. If so the will would be void as to them and good against the defendant in this suit. This cannot be."

This reasoning is unsound in this, that Judge Tucker assumes, that while such a decree was in force the heirs who had not been made parties, would for that reason not be bound by the decree affirming the will, and admitting it to probate. This is clearly not so. The admitting a will to probate is a judgment *in rem*, and while the order admitting it to probate is unreversed it is binding on all parties, whether parties to the proceeding by which it was admitted to probate or not. See *Wills v. Spraggins*, 5 Gratt. 555 and *Connolly v. Connolly*, 32 Gratt. p. 657.

In this respect as in many others a suit in equity to set aside the probate of a will, differs most essentially from other suits in equity; for it is unquestionable, that in ordinary suits in equity a decree of the court is not binding on persons, who ought to have been but who were not, parties to the cause. And Judge Tucker fell into the error of supposing, that this rule applied also to suits to set aside the probate of a will; but it clearly does not. Still according to the case of *Connolly v. Connolly*, 32 Gratt. 657 the persons who were not made parties to the cause are not without a remedy in such a case, for they have a right to file a bill in chancery in the nature of a bill of review, and in it have the issue of *devisavit vel non* tried again, making all the proper parties to the suit. And if the verdict of the jury on the issue of *devisavit vel non*, should be different from the former verdict of the jury, the court may enter up a decree setting aside and reversing its former decree, and rendering a new decree in accordance with the last verdict of the jury.

It does not however seem to me, that Judges Cabell and Stanard, based their opinion in *Kincheloe v. Kincheloe*, 11 Leigh 398, on as solid ground as it might have been based; for they evidently did not draw the distinction we have referred to between a chancery cause to set aside the probate of a will, and other chancery causes. The truth is, that a

chancery cause to set aside the probate of a will, has but very little resemblance in many respects to an ordinary chancery suit. And the rules which govern the proceedings in it, are generally very different from those governing the proceedings in other chancery causes. Thus we have seen, that the rule universally applied in other chancery causes, that the chancery court having taken jurisdiction properly of the cause will proceed to do complete justice to the parties, and will not turn them over to another suit either at common law, or in chancery, has no sort of application to a chancery suit brought to set aside the probate of a will. So too the rules, which govern in setting aside the verdict of a jury in the trial of ordinary issues out of chancery, are not applied to the issue of *devisavit vel non*, ordered in a suit brought to set aside the probate of a will. On the contrary in such suits, the rules which govern courts of common law in the trial of actions at law, are applied in such a case. In fact a chancery cause to set aside the probate of a will, in most respects, is conducted like a common law suit. The issue tried is to settle the *legal* rights of parties, and it is only tried under the supervision of a chancellor. This supervision of the jury is all he has to do in the cause. If the verdict of the jury on common law principles is right, he must enter up his decree in accordance with such verdict. Now there is no such rule of common law, that every person materially interested in the subject of the controversy, must be made a party to a common law suit; nor will the court dismiss the case unless all such persons are made parties. After the verdict of a jury too, in a common law case, judgment will be very generally rendered pursuant to the verdict, though the declaration was liable to demurrer. The rendition of the verdict cures almost all preceding defects.

These are the rules, which after the rendition of a verdict on an issue of *devisavit vel non* should govern, rather than the rules which govern in ordinary chancery suits. Before the rendition of such verdict, the parties may by demurrer or otherwise object, because proper parties have not been made, or because the bill is for any reason bad. But as in a common law suit such objections come too late after a verdict; so it does in a chancery suit of this character. This differ-

ence between ordinary chancery suits and a suit of the character of the one before us must be preserved, because in an ordinary chancery suit only the parties to the cause, or those who should be made parties are concerned. But it is far otherwise in the probate of a will or a decree pronouncing, that a decedent dies intestate. A very large number of persons have a deep interest in this question besides the immediate devisee and heirs of the decedent. The general public have an interest. They must know with whom to deal as the representative of the estate, whether the executor under the supposed will, or an administrator. It is important to the general public, that this question should be speedily decided, and when decided it should not be liable to be changed except by a review of the very decision by which it was decided. This is the spirit of our law and our decisions, and in accordance with this spirit the verdict of a jury on an issue *devisavit vel non* and a decree based upon such verdict ought not to be set aside and reversed by the appellate court, merely because there was an omission to make all the proper parties defendants in the court below, if no objection was made in the court below on that account, till after the rendition of the verdict.

Ought the verdict of the jury to have been set aside, because of the alleged misconduct of a juror in listening to, or engaging with others in conversations concerning the evidence and witnesses in the case, pending the trial of the issue. There is no allegation, that any of the plaintiffs or any friend of theirs, with a view of promoting their interest in any way, interfered with any juror. If such allegation had been made, it would justly have given rise to such a suspicion of foul play, that it could hardly be resisted. If the party in whose interest a verdict is found, or any one with the object apparently of promoting this interest, whether asked to do so or not, approaches the jury unfairly, their verdict will be set aside without looking into the merits of the verdict. Public policy as well as private justice demands this. See *Perkins v. Knight*, 4 N. H. 474; *Ritchie v. Holbrooke*, 7 Serg. & R. 458; *State v. Hascall*, 6 N. H. 352; *Knight v. The Inhabitants of Freeport*, 13 Mass. 218; *Cohen v. Robert*, 1 Stub. 210; *Coster v. Merest*, 3 Brod. & Bing. 272. But mere casual conversations with a third person about the case

by a juror, without the knowledge or connivance of a party to the case will not *per se* be sufficient to induce the court to award a new trial. To justify the court in so doing in such a case, there must be a manifest tendency in what has been said to influence the juror to the prejudice of the party, who seeks to set aside the verdict. See *Grinnell v. Phillips*, 1 Mass. 530; *People v. Boggs*, 20 Ca. 433; *Jackson v. Jackson*, 32 Ga. 325; *Nelson v. State*, 21 Miss. 500; *Perkins v. Knight*, 2 N. H. 474; *Blain v. Chambers*, 1 Serg. & R. 169; *Stewart v. Small*, 5 Miss. 525.

But even when the conduct of a juror is such, that the court would set aside the verdict, if this is known to the party or his counsel, who seek to set aside the verdict before the jury retired to consider of their verdict, and he fails to disclose it to the court till after the verdict is rendered, he thereby waives all objection on this account to the verdict, which may be rendered. And the court will not disturb the verdict for this reason on his motion. See *Pettibone v. Phelps*, 13 Conn. 445; *Stewart v. Small*, 5 Miss. 525; *Fessenden v. Sager*, 53 Me. 531; *Jackson v. Jackson*, 32 Ga. 325; *Martin v. Tidwell*, 36 Gro. 332; *Herbert v. Shaw*, 11 Md. 118; *Brunskill v. Giles*, 9 Bing. 13. There was evidently no manifest tendency in what Dr. Knight said to the stranger, in the presence of the juror to influence the juror, as what was said by Dr. Knight, was said under circumstances that made it very probable that it would have been very imperfectly understood by the juror. For the parties carrying it on were in two different buggies, the one behind the other, and both traveling at a lively trot. It is not probable, that one in the buggy not engaged in such conversation would either hear distinctly, or understand such a conversation. What the juror said to the stranger in the buggy, amounted to but little, except, that it showed that he the juror was guilty of misconduct. But even if this misconduct would have justified the court in setting aside the verdict, it could not properly do so, for the reason, that in this case it was admitted, that the counsel for the defendants knew of this conversation of the juror and these parties, before the case was submitted to the jury; and if they objected to it they should have called the attention of the court to it, before the jury retired. They could not take

the chances of a verdict in their favor, and then when disappointed in this, get the verdict set aside for an objection to the jury on their part, known to them before the jury retired.

It is true the defendants' attorneys did not know which one of the jury had heard this conversation. The party holding the conversation not hearing correctly the juror's name. But he could have pointed out the juror in the box if called on to do so, with the same facility that he did after the verdict was rendered. So that this furnishes the defendant with no excuse for failing to call the attention of the court to the matter, before the jury retired. The fair inference to be drawn is, that the defendants' attorney after hearing all had that passed with this juror concluded, that he was unprejudiced, and that they would therefore make no objection to him, or call the court's attention to the matter.

The next enquiry is, ought the court to have set aside the verdict because of the after-discovered evidence? This Court has repeatedly determined under what circumstances a court of law or equity, ought to award a new trial for after-discovered evidence. These principles are to be found in the following cases, among others: *Lucas v. Locke*, 11 W. Va. 81; *State of West Virginia v. Betsall*, 11 W. Va. p. 703; *Zickefoose v. Kuykendall*, 12 W. Va. p. 23; *State of West Va. v. Williams*, 14 W. Va. 851; *Sayre v. King*, 17 W. Va. p. 562; *Kimmins v. Wilson*, 8 W. Va. 584; *Roderick v. Rail Road Co.*, 7 W. Va. 54; *Snider v. Myers*, 3 W. Va. 195; *Bates v. The State*, 3 W. Va. 685; *Lewis et al. v. McMullin*, 5 W. Va. 582; *Gillilan v. Ludington*, 6 W. Va. 128; *Strader et al. v. Goff et al.*, 6 W. Va. 257. Among these principles we find there: First, that the evidence must be such, as reasonable diligence on the part of the party asking it, could not have secured at the former trial; second, it must be material to its object, and not merely cumulative, corroborative or collateral; third, it must be such as ought to produce on another trial important results on its merits.

The newly discovered evidence in this case fails to come up to these requirements. The defendant Church, with reference to the testimony of Hill says, he will prove that some three or four years before January 9, 1876, the date of the will, that John J. Weaver told him, that Pat Dower had

gone over to Antiquity against his wishes, and was selling whisky there, and that he did not intend to give Pat Dower or his wife, anything; that it would be the same as giving it to Pat, as he would get it from her. This was merely cumulative evidence; several witnesses having testified to Mrs. Weaver's having at different times said the same thing, or something very similar to it. And it ought not to produce on another trial an opposite result, for the weight of the evidence is, that while he did say this frequently, yet from the time he made the first will in 1868, up to within ten days of his death he often declared, that he would dispose of his property as that will did; that is give half of it to his daughter, the wife of Patrick Dower, after his own wife's death, and that he did not wish to alter, and would not alter this will of 1868.

The witness Hall, too proved, that he knew Church well, had been attending the trial of the case being a juror in other cases, and saw Church often during the trial. And under these circumstances, reasonable diligence it seems to me, would have enabled the defendant Church to have discovered this evidence before the case was submitted to the jury. The only other after-discovered evidence was that of Wm. Blackmore, of Ohio, a blacksmith, who Church, the defendant swears he is informed and believes, would testify that two or three days after January 9, 1876, he went to Weaver's house to collect a blacksmith's bill, which Weaver owed him; that he recognized him, and remembered the exact amount he owed him, and directed his wife to pay the bill. This was of course known to Mrs. Weaver, and she was a witness for the defendants at the trial, and if she could she would have stated this fact; and if she could not, the statement of this Blackmore, could have had but little weight with the jury. It certainly ought not uncorroborated by Mrs. Weaver, to have produced a different result. If what is here stated be true, it would certainly have required very little diligence on the part of Church to have discovered the evidence before the trial, as it was known to the foster mother of his wife. He does not state, how he happened to discover this new evidence within five days after the verdict was rendered, and could not discover it before the trial, though this issue was not tried for two years after it was ordered.

If the courts were to grant new trials for after-discovered evidence, where no stronger reasons were shown for so doing than in this case, the result would be, that new trials would be asked for and obtained in almost every case involving any considerable amount. During the progress of this trial the court struck out, and refused to permit to be read to the jury, three questions and answers from the deposition of Angelina Seeds, offered by the defendant, and refused to strike out fourteen questions and answers in the plaintiff's deposition, but permitted them to be read to the jury. And the appellants claim, that they were prejudiced before the jury by this action of the court. The questions propounded to the defendants' witness, Angelina Seeds, the former wife of J. J. Weaver, were questions asking her to state the conversations she had had with any person, about the disposition J. J. Weaver had made of his property, and with whom did she have the conversations, and what was said; and whether she had said certain things to a certain party about this will, and whether she had said to anybody, that Mr. Weaver was under the influence of morphia. These questions were propounded on the examination in chief of Angelina Seeds, and were properly rejected. The only one of them which had the appearance of being proper, was the one asking her whether she had not said to a certain party a certain thing about Mr. Weaver's will; and as the evidence of this party about what Mrs. Weaver had said was excluded from the jury, it was of course proper to exclude her statement about this matter.

Of the fourteen questions and answers of the plaintiffs' depositions, which the court permitted to be read against the defendants' objections, six of them were propounded to witnesses to prove what they knew of the mental and bodily condition of John J. Weaver, which were answered by each witness stating that, he would when this will was made or about that time, have been willing to have transacted important business with him.

The principles laid down by this Court in the case of *Jarrett et al. v. Jarrett et al.*, 11 W. Va. 584, are, that the evidence of witnesses present at the execution of a deed is entitled to peculiar weight; and this is evidently equally appli-

cable to the evidence of witness present at the execution of a will. And, that the evidence of physicians and especially those who attended the maker of a deed and of course of a will, and who were frequently with him during the time that it was charged that he was incompetent, is entitled to great weight. Next to physicians and those who were present at the time the deed, and of course the will was executed, either as attesting witnesses or otherwise, are those whose intimacy in the family have given them the opportunity of seeing the party at all times, and watching the operations of his mind. The mere opinions of witnesses not experts, are entitled to little or no regard, unless they are supported by good reasons founded on facts, which warrant them; and if the reasons and facts on which they are founded are frivolous, the opinions of such witnesses are worth but little or nothing.

In the case before us, the facts and reasons of the witnesses were given to the jury, so that they had the opportunity of judging of the weight, which ought to be attached to the opinion of each of the witnesses, and there being given, the witness may according to this case, give his opinion as to the competency of the grantor or of course a testator. In a particular case this opinion may be worth very little, still it is competent and relevant testimony, when thus accompanied by the facts on which it is based; and it was properly not excluded from the jury. It is true as decided in that case, it requires more capacity to make a valid deed than it does to make a will; and therefore, the incapacity of J. J. Weaver to transact important business, would not necessarily lead to the conclusion that he was incompetent to make his will. Nevertheless, his incompetency to transact important business would properly go before the jury for what it is worth, as tending to throw light on the issue they were trying, and after a witness stated the facts on which he based his opinion, he had a right to say that in his opinion he was not in a mental condition to transact important business.

The value of such testimony must depend in a large degree, on the facts on which the opinion is based, but the court could not, after having the facts stated, properly refuse to let the opinion of the witness on this point be stated to the jury.

Nor was there any error in the court permitting the other questions and answers in the depositions of the plaintiffs in this cause, being read to the jury, which were objected to, and which were permitted to be read.

The other questions and answers, which the court permit in the depositions, the plaintiffs in this cause to ask about and the witness to answer, had reference to the relations and feelings of J. J. Weaver to Teresa Dower, and his acknowledgment of her as his child; and his doubting, whether the defendant Ann Eliza Church, was his child; and as to statements made by Mrs. Weaver now Angelina Seeds, as to her dissatisfaction with the disposition of his property made in 1868. The court did not err in permitting this evidence to go to the jury. Angelina Seeds had sworn, that she was satisfied with the disposition J. J. Weaver had made of his property in 1868, by his will; and the plaintiffs in this cause had a right to show, that this was not so, and thus to strengthen their evidence which tended to show, that she took advantage of his weakened condition both of mind and body, to induce or force him to change this will and execute another, which would meet with her approval, and not with his wishes. And they had equally as clear a right to show, that he recognized Teresa Dower, for whom by the contested will he made no provision, as his child and did not recognize Ann Eliza Church as his child, to whom after his wife's death, he gave all his property by the contested will. See *McKee v. Nelson*, 4 Cow. 355; *Peck v. Cary*, 27 N. Y. 9; *Gombault v. Public Adm'r* 4 Bradf. (N. Y.) 226; *Coffin v. Coffin*, 23 N. Y. 9; *Lynch v. Clements*, 24 N. J. Eq. R. 481; *Bitner v. Bitner*, 65 Pa. St. R. 347.

It only remains to determine, whether the circuit court erred in refusing to set aside the verdict on the motion of the defendants in this cause, as contrary to the evidence and the law. The facts as we have stated them do show, that the attending physician of J. J. Weaver, as well as the attesting witnesses, and some of the parties who had the best opportunity to judge, all testified to the competency of the testator; and the attesting witness and some others testify to facts, which would seem clearly to show, that he was when he made the will in controversy, of sound mind and disposing memory.

But on the other hand a large number of witnesses who saw him but a short time, either before or after this will was made including his consulting physician, testify to facts in reference to his condition, which seem to be irreconcilable with this testimony of the defendants in this cause, to which I have referred. The jury could scarcely believe the statements of many of these witnesses, and yet believe that attesting witnesses and others had fairly detailed to them the facts and occurrences, which they say occurred just before or just after the will was executed. This conflicting evidence the jury could not reconcile. They concluded, that the testimony which tended to show the incompetency of the testator, was entitled to the most weight strengthened as it was by the fact, that the testator when of a perfectly sound mind and disposing memory, had some eight years before made a will, whereby after his wife's death he gave half of his large property to Teresa Dower, whom he acknowledged to be his child; and that he repeatedly and up to within a few days of the time when it is claimed he executed this last will, declared himself satisfied with his former disposition of his property, and would not change it.

The jury too, upon the evidence may well have supposed, that undue and improper influence may have been brought to bear to obtain the execution of the last will. And though we might think the evidence on this point, not very strong, still it was with the jury to judge of its weight. Had they found a verdict for the will, the court could not with propriety have set aside the verdict. For there was much evidence as we have seen to show, that the intestate was unquestionably competent to make a will; and it was further shown, that he had frequently said he would give Teresa Dower nothing, because her husband against his wishes, had engaged in selling whisky as a business.

The case however was one, whose decision must have largely depended upon the weight, which the jury gave to the evidence respectively of the plaintiffs and the defendants. This was to a large extent conflicting. If only the evidence offered by the defendants in the cause was considered, there could not have been a verdict rendered against the will; and on the other hand, if the evidence offered by the plaintiffs

in the cause, and that portion of the evidence offered by the defendants which did not conflict with the plaintiffs' evidence, the jury could not have done otherwise than find as they did, that the paper which had been probated was not the will of the intestate.

The rule which governs the granting of new trials in a case of this character, when the evidence is all parol evidence and is conflicting, is well established. The rules which govern in granting new trials generally, in issues out of chancery, and those governing the granting of new trials in common law suits differ somewhat. See *Barker v. Ray*, 2 Russ. R. p. 63; 3d English Law and Ch. R. p. 31; *Tompkin's Ex'r v. Stephens et al.*, 10 W. Va. p. 156; *Head v. Head*, 1 Sim. and St. 156; 1 Eng. and Ch. R. p. 74; *Apthorpe v. Comstock*, 2 Paige R. 487; *Henry v. Davis*, 7 W. Va. 720.

But in the trying of this particular issue in this case of *deviavit vel non*, the rule which governs a common law court in granting new trials prevails, and that rule is, that in reviewing the action of the court below when the evidence is all parol evidence, and it is conflicting, the appellate court will reject all the evidence of the exceptor, which is in conflict with the other party; and upon the evidence of the appellee giving it full force and effect and that of the appellant not in conflict with it, the case is in favor of the appellee, the verdict of the jury and the decree based upon it will be approved and affirmed. See *Lambert v. Cooper's Ex'ors*, 29 Gratt. 61; *Webb v. Dye*, 18 W. Va. p. 376. See also *Nicholas v. Kirshner*, 20 W. Va. p. 251. That the same principles prevail in the granting of new trials when the evidence is conflicting, appears from the following West Virginia cases: *Seibright v. State*, 2 W. Va. 591; *Newlin v. Beard et al.*, 6 W. Va. 110; *Gaus v. Kammer*, 9 W. Va. 64; *Tracy v. Cloyd*, 10 W. Va. 19; *Miller v. Insurance Co.*, 12 W. Va. 116; *Nease v. Capehart*, 15 W. Va. 299, and *Sheff et ux. v. The City of Huntington*, 16 W. Va. 308.

Upon these principles this Court can not in this case set aside the verdict of the jury, nor would it have done so had the verdict been in favor of the will. It was a case peculiarly appropriate for the determination of a jury, depending largely on the credibility of the witnesses. Our conclusion therefore

is, that the decree of November 1, 1879, is not erroneous in so far as the court expressed the opinion, that the plaintiffs were entitled to the relief prayed for, in so far as they ask the setting aside of the paper writing purporting to be the last will and testament of John J. Weaver, deceased, probated by the county court of Mason county, on the 24th of January, 1876; and so far as it adjudged, that it was not and is not, nor was nor is any part thereof the will of John J. Weaver, deceased; and so far as it set aside and annulled the said order, probating said paper as the last will and testament of John J. Weaver.

But after doing this, the court proceeded at the request of the plaintiffs, in order give them an opportunity in this suit of setting up and establishing the will, alleged in their bill to have been made and published in 1868, and alleged to have been lost or destroyed, to remand this cause to rules with leave for the plaintiffs to amend their bill, by making the heirs at law of John J. Weaver, defendants thereto, and with leave to have the process issued and served upon them to answer said bill as amended.

This decree must therefore be amended by this Court, by striking out this portion of it, and in lieu thereof adjudging, that the defendants in the court below pay to the plaintiffs in the court below their costs in the circuit court expended, and providing, that this decree shall in no manner prejudice the plaintiffs or any of them in any suit or proceeding of any sort, which they may be advised to institute to have the will alleged to have been executed in 1868, either probated or established in a court of equity. And this decree being thus corrected, must be affirmed by this Court, and the appellees must recover of the appellants their costs in this Court expended and thirty dollars damages, and this decree must be certified to the circuit court of Mason county.

JUDGES HAYMOND AND JOHNSON CONCURRED.

DECREE CORRECTED AND AFFIRMED.

WHEELING.

BRYAN *et al.* v. WILLARD *et al.*

21	65
39	437
39	444

21	65
50	342

Submitted August 15, 1882—Decided December 2, 1882.

1. Under the act of June, 1788, authorizing the Governor to issue grants with reservations of prior claims included within the boundaries thereof, the reservations in such grants, under said act, exclude from their operation all lands held by prior claimants at the dates of the surveys on which such grants are founded, within the exterior boundaries of the grants, whether the title was only inchoate or had been perfected by grants. (p. 72.)
2. Under an inclusive grant, issued by virtue of said act, containing a general reservation of a specified quantity of land for prior claimants, the grantee acquires no title whatever to the land so reserved. And in such case, if the title of any such prior claimant becomes forfeited for non-entry or for the non-payment of taxes, the title thus forfeited will not vest in such inclusive grantee under the act of March 22, 1842. (p. 74.)

Writ of error to a judgment of the circuit court of the county of Kanawha rendered on the 8th day of July, 1881, in an action of ejectment in said court then pending, wherein Joseph Bryan and others were plaintiffs, and John Willard and others were defendants, allowed upon the petition of said plaintiffs.

Hon. F. A. Guthrie, judge of the seventh judicial circuit, rendered the judgment complained of.

The facts of the case are fully stated in the opinion of the Court.

William H. Hogeman for plaintiffs in error.

William A. Quarrier for defendants in error.

1. A junior inclusive grant confers no title to the grantee to the land of prior claimants inside the boundaries of the junior grant. *a.* Whether the title of the claimant be evidenced by entry, survey or grant. *b.* Or whether the exclusion and reservation contained be specific, (by names and

quantities,) or general, (without names and by aggregating quantity.)

2. The reservation and exclusion does not depend upon the act or intent of the surveyor, junior grantee, register or governor, or the words of the junior grant, but results from the act of 2d June, 1788.

3. If the title of the senior claimant be forfeited for non-entry or for non-payment, the junior inclusive grant can not take the forfeited title.

4. A person claiming a forfeited title under the act of 22d March, 1842, must show, and the burden is upon him to show, that he is in a condition to take the forfeited title.

5. Whenever it appears that there is a junior inclusive survey, with a general reservation for prior claims, and it appears that the claim is prior and wholly or in part inside of the junior grant, this is sufficient, no other proof is required. No title good or bad is granted to the junior grantee to the land included in the prior claim.

5 Pet. 81; 14 Wall. 120; 3 W. Va., 212; 10 W. Va. 387; 4 Rand., 365; 6 Munf., 49; 30 Gratt. 582.

Thomas B. Swann and Smith & Knight for defendants in error cite the same authorities as above.

SNYDER, JUDGE, announced the opinion of the Court:

This was an action of ejectment brought in the circuit court of Kanawha county, on November 5, 1877, to recover five thousand acres of land situate in said county. The defendants disclaimed title to all of said land except about one thousand one hundred acres. An issue was joined on the plea of not guilty and tried by a jury which resulted in a verdict for the defendants. The court, on July 2, 1881, gave judgment for defendants on said verdict. On the trial the plaintiffs and defendants each requested an instruction to the jury. The court refused the instruction of the plaintiffs and gave that of the defendants to the jury, and the plaintiffs excepted. The plaintiffs' bill of exceptions shows the case to be, substantially, as follows:

On the 24th day of August, 1794, Albert Gallatin and Savary de Valcoulon, according to an entry previously made

by them, caused a survey to be made of two thousand acres of land situate on the southwest side of the Kanawha river in Kanawha county, and a grant issued to them for said land, so entered and surveyed, on the 22d day of July, 1795. This tract of land, having become forfeited for the failure of the owners to have the same entered on the books of the commissioner of the revenue and pay the taxes thereon, was sold by the commissioner of delinquent and forfeited lands, by proceedings had under the acts of March 30, 1837, and March 15, 1838, providing for the sale of delinquent and forfeited lands under orders and decrees of courts. The said sale was confirmed and deeds executed to the purchasers. By a series of conveyances the title to the land thus sold, to the extent of the one thousand one hundred acres now in controversy, became vested in the defendants in this action and this constitutes their paper title to said land.

On the 24th day of October, 1794, and January 25, 1795, William Wilson made entries for eighty-five thousand six hundred acres of land on the southwest side of Kanawha river in said county, and on April 14, 1795, caused a survey thereof to be made and on the 1st day of January, 1796, a grant issued to Benjamin Martin assignee of said Wilson for said land. This is what is known as an inclusive survey and the grant contains this reservation: "But it is always to be understood that the survey upon which this grant was founded includes six thousand seven hundred and eighty-six acres of prior claims (exclusive of the above quantity of eighty-five thousand six hundred acres) which having a preference by law to the warrants and rights upon which this grant is founded, liberty is reserved that the same shall be firm and valid and may be carried into grant or grants, and this grant shall be no bar either in law or equity to the confirmation of the title or titles to the same, as before mentioned and reserved, with its appurtenances," &c.

By sundry conveyances all the title acquired by Martin under said grant and whatever title, if any, enured to said title by the forfeiture of the Gallatin title to the aforesaid two thousand acres, in and to the said eighty-five thousand six hundred acres of land, to the extent of the five thousand acres in the plaintiffs' declaration mentioned, became vested

in the plaintiffs before, and was owned by them at the time this action was instituted, and this constitutes the plaintiffs' title to said land.

The location and identity of the lands embraced in the respective grants aforesaid are agreed in the record, and the exterior boundaries of each covers and includes the land in controversy. The Wilson survey calls for the upper back corner of the Gallatin survey and two of the exterior lines of the Wilson run inside of the boundary of the Gallatin and thus is formed an interlock of about one thousand one hundred acres which is the land in controversy in this action in this Court. There was evidence tending to prove that the defendants and those under whom they claim had been in the actual adversary possession of the said one thousand one hundred acres for a period of time beyond that prescribed as a bar by the statute of limitations. But there was no evidence that the plaintiffs had ever been in the actual possession of any part of the land in their declaration mentioned. It was shown that the plaintiffs had paid the taxes on the lands in said Wilson survey up to and including the year 1842, and that the title to the Gallatin survey had become forfeited for non-entry and the non-payment of taxes thereon prior to the said year 1842. Thereupon the plaintiffs moved the court to instruct the jury as follows:

"The court instructs the jury that inasmuch as it is a conceded fact in this action that the Gallatin survey of two thousand acres, which has been given in evidence by the defendants, was at the date of the passage of the act of March 22, 1842, concerning delinquent and forfeited lands, forfeited to the commonwealth for the non-payment of taxes due thereon, or for the failure of the owners to cause the same to be entered on the books of the commissioner of the proper counties and have the same charged with taxes according to law, that the said survey then was, by reason of said forfeiture, vested in the commonwealth; and if the jury find from the evidence that the William Wilson survey of eighty-five thousand six hundred acres and the grant thereunder given in evidence by the plaintiffs, and under which they claim, included any part of the land embraced within the boundary of the said forfeited survey, and that the persons

having just title or claim to said Wilson survey at the passage of the act aforesaid shall have paid all taxes duly assessed and charged against them, and all taxes that ought to have been assessed or charged thereon from the time they acquired title thereto, then, by virtue of the said act of March 22, 1842, that portion of the forfeited survey embraced within the boundary of the Wilson survey which had become and was vested in the commonwealth, became absolutely transferred to and vested in the said persons having such title and claim to said Wilson survey, except so far as any persons made *bona fide* claim to any part of said land by title, legal or equitable, derived from the commonwealth, and on which the taxes had been fully paid up according to law."

To the giving of which instruction the defendants objected, and in lieu thereof the defendants asked the court to instruct the jury as follows, to-wit :

"If the jury find from the evidence that the grant to Gallatin and Savary under which the defendants claim is older than the grant to Martin under which the plaintiffs claim, and that the Gallatin and Savary grant is founded on an older entry and survey than the entry and survey upon which the Martin grant is founded, and that any portion of the land in controversy is included within the calls of each of said grants, then the jury should find under the evidence in this cause that the land embraced in the said grant to Gallatin and Savary was excluded from the grant to Martin by the terms of the Martin grant, and Martin acquired no title thereto by his grant, and in that event the jury should find for the defendants as to all of the lands claimed in the plaintiffs' declaration inside of the said Gallatin and Savary grant."

To the giving of which instruction the plaintiffs objected, and the said objections of the defendants and plaintiffs respectively being argued and considered, the court was of opinion to and did accordingly sustain defendant's objections to plaintiffs' aforesaid instruction, and did overrule plaintiffs' objection to defendants' instruction; and thereupon the court refused to instruct the jury as requested by plaintiffs, but did instruct the jury as requested by defendants.

If the court properly gave the instruction asked for by the

defendants, it follows, inevitably, that it did not err in refusing the instruction requested by the plaintiffs, because the one is simply the converse of the other. The whole question, then, presented to this Court is, whether or not the circuit court erred in granting the defendants' said instruction.

The entry, survey and grant of the Gallatin survey are each prior in date to the entry, survey and grant of the Wilson survey, and being prior in time they vested in Gallatin the title to the one thousand one hundred acres in the interlock and no title thereto, then vested under the Wilson grant; consequently, if those claiming under the Wilson title ever acquired any title to the said one thousand one hundred acres, they must have acquired it under the third section of the act of March 22, 1842, which is as follows:

"3. *And be it further enacted*, That all right, title and interest, which shall be vested in the commonwealth in any lands or lots lying west of the Allegheny mountains, by reason of the non-payment of the taxes heretofore due thereon, or which may become due on or before the first day of January next, or of the failure of the owner or owners thereof to cause the same to be entered on the books of the commissioner of the proper counties, and have the same charged with taxes according to law, by virtue of the provisions of the several acts of assembly heretofore enacted in reference to delinquent and omitted lands shall be, and the same are hereby absolutely transferred to, and vested in any person or persons, (other than those for whose default the same may have been forfeited, their heirs or devisees,) for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held or derived from or under any grant of the commonwealth, bearing date previous to the 1st day of January, 1843, who shall have discharged all taxes duly assessed and charged against him or them upon such lands, and all taxes that ought to have been assessed or charged thereon, from the time he, she or they acquired title thereto, whether legal or equitable: *Provided*: That nothing in this section contained, shall be construed to impair the right or title of any person or persons, who shall *bona fide* claim said land by title, legal or equitable, derived from the commonwealth, on which the taxes have been fully paid up

according to law, but in all such cases the parties shall be left to the strength of their titles respectively."

It will be seen that the benefit of the forfeited title is only transferred "for so much as such person or persons may have just title or claim to, legal or equitable claimed, held or derived for or under any grant of the commonwealth bearing date previous to 1st day of January, 1843."

It is conceded that the Gallatin title became forfeited for the non-payment of the taxes thereon prior to the 1st day of January, 1843. It is, also, conceded that the Wilson grant is dated anterior to said date, that all the taxes chargeable thereon were paid and the land in controversy is embraced within the interior boundaries of said grant. In other words, it is conceded that, if Wilson acquired title to the said one thousand one hundred acres of land by his grant, subject to the elder title of Gallatin, then, by the forfeiture of the Gallatin title he became vested with the title by virtue of said act of March 22, 1842. The only question then to be determined is, did the Wilson grant pass to the grantee therein any title whatever to the said one thousand one hundred acres? The said grant was issued under the act of June, 1788—2 Rev. Code 434—which is as follows:

"WHEREAS, Sundry surveys have been made in different parts of this commonwealth, which include in the general courses thereof, sundry smaller tracts of prior claimants, and which in the certificates granted by the surveyors of the respective counties are reserved to such claimants; and the Governor or chief magistrate is not authorized by law to issue grants upon such certificates of surveys; for remedy whereof,

"1. *Be it enacted by the General Assembly*, That it shall and may be lawful for the Governor to issue grants with reservations of claims to lands included within such survey, anything in any law to the contrary notwithstanding."

This act recites in terms that prior to its passage the Governor was "not authorized by law to issue grants," which included "in the general courses thereof, sundry smaller tracts of prior claimants." It is evident, therefore, that it was not the intention of the Legislature by said act to pass to the grantee of an inclusive grant any title to the lands of prior claimants embraced within its exterior boundaries. This in-

tention is carried into, and made manifest by, the form of the grants issued under said act. The very contract under which the grantee asserts his claim and title expressly and in positive terms states that the prior claims have preference by law to the rights conferred by this grant and that the said rights of prior claimants are reserved and shall be firm and valid against this grant. It has been uniformly held by the courts of Virginia and this State as well as by the Supreme Court of the United States and the courts of Kentucky that grants issued under this act pass no title whatever to the lands excluded and excepted therefrom for prior claims.

In *Hopkins v. Ward*, the court says: "The court is of opinion, that under the terms of the patent in this case, the grantee was entitled to all the land contained within the metes and bounds thereof, *subject, however, to the reservations in said patent contained.*" 6 Munf. 40.

The syllabus in *Nichols v. Corey*, 4 Rand. 365 is, "Where a patent is issued in pursuance of the act of 1788, which includes in its general courses, a prior claim, *it does not pass to the patentee the title of the commonwealth in and to the lands covered by such prior claim, subject only to the title, whatever it may be, in the prior claimant*; but, if that title is only a prior entry, and becomes vacated by neglect to survey and return the plat, any one may lay a warrant on the same, as in other cases of vacant and unappropriated lands." This syllabus is adopted and the principles contained therein are approved and applied by this Court in *Patrick v. Dryden*, 10 W. Va. 387.

In *Armstrong v. Morrill*, Judge Clifford in delivering the opinion of the court says: "Where the exterior boundaries of a survey under that law, (the act of 1788,) upon which a patent is founded includes tracts belonging to prior claimants, the patentee cannot in such a case recover in ejectment without showing that the tract claimed by the defendant is not within the bounds of the excluded claims, which is a direct authority that the reserved lands in a case like the present did not pass to the patentee." 14 Wal. 143; see also *Madison v. Owens*, 6 Litt. Select Cas. 281; *Scott v. Ratliffe*, 5 Pet. 81; and *Trotter v. Newton*, 30 Gratt. 582-89.

In *Armstrong v. Morrill*, *supra*, it was also, held that, under

the act of Virginia of June, 1788, authorizing the Governor to issue grants with reservation of claims to lands included within surveys then made, the reservation in patents granted under the act excludes from the operation of the patent all lands held by prior claimants at the date of the survey, within the exterior boundary of the patent, *whether the title was only inchoate or had been perfected by grants.*

The principle announced in these authorities, I think, fully disposes of the case at bar. The facts show that the Gallatin entry, survey and grant were prior in time each to the entry, survey and grant of Wilson, and that a portion of the lands embraced in the Gallatin grant, the one thousand one hundred acres in controversy, lie within the exterior boundaries of the Wilson survey. The Wilson expressly excepts from its grant six thousand seven hundred and eighty-six acres for prior claims. The Gallatin was certainly a prior claim and it is, to the extent of one thousand one hundred acres, within the Wilson survey. The Wilson excepts for such prior claims six thousand seven hundred and eighty-six acres; and there is no evidence whatever that this one one thousand one hundred acres is not excepted, nor that there are any other prior claims within said survey.

It is, however, claimed by the plaintiffs in error that inasmuch as they have shown that the exterior boundaries of the Wilson survey include the land in controversy, the burden is on the defendants, who claim that the Gallatin survey was reserved and excepted, to prove that the Gallatin was in fact excepted. If it is intended by this claim to assert, that the defendants must show affirmatively that it was the *intention* or caprice of the surveyor or Wilson, at the time the Wilson survey was made, to except this particular one thousand one hundred acres of land, the claim is not sustained by law or reason; but if it is simply intended to assert that the defendants shall prove that the Gallatin survey and entry were prior in time and cover the one thousand one hundred acres, the answer is, that they have done this to the satisfaction of the jury; because the instruction submitted these facts to the jury and they found them for the defendants.

In *Hopkins v. Ward*, where a grant had issued to Hopkins under the act of 1788 for seventy thousand two hundred and

two acres, dated July 2, 1796, which contained a reservation of forty-two thousand acres for prior claims, the court held, that Hopkins, the plaintiff, was "entitled to recover in ejectment all the land within the metes and bounds of his grant, *except such as the defendants might show themselves entitled to under said reservation.*" In this case the defendants failed to show any *prior claim*, whatever, to any part of the land included within the metes and bounds of the Hopkins grant. The defendants in the case at bar do show such prior claim and thus bring themselves within the decision in *Hopkins v. Ward*.

The principles announced as well as the reasons given in the more recent and better considered cases before cited, it seems to me, very much restrict, if they do not overrule, the doctrine laid down in the case of *Hopkins v. Ward*. The doctrine of the more recent cases seems to be, that, inasmuch as the grantee of an inclusive grant acquired, by the terms of his grant and the law, no title whatever to the land therein reserved and excepted for prior claims, such grantee, or those claiming under him, ought not in ejectment to recover any more land than the quantity granted to him. That being all he purchased and paid for and all that he has entered on the assessor's books and pays taxes for. The *residuum*, if not carried into grant by prior claimants, or if, in fact no such claimants ever existed, as is frequently the case, remaining in the commonwealth subject to grant as any other unappropriated lands. If, therefore, such grantee is not permitted to recover more than the quantity actually granted to him, it necessarily follows, that he can not recover from a defendant, claiming within the exterior boundaries of his grant, without showing that such defendant is occupying land granted to him; and in order to do this, he is compelled to locate his land to ascertain whether or not the defendant is occupying any part of it or whether he is on the reserved land not granted to him.

In *Hopkins v. Ward*, the court says: "That under the terms of the patent exhibited in this case, *the grantee was entitled to recover all the land contained within the metes and bounds thereof, subject, however, to the reservations in said patent contained.*" The language here used would seem to indi-

cate that **it was** the opinion of the court, that the grantee took all the land embraced in the grant *subject only* to the rights of the prior claimants, if any, and if none, he was entitled absolutely to the land. If this was the decision in that case then, the subsequent decisions of *Nichols v. Corey* and *Patrick v. Dryden* expressly overrule it; because in those cases the courts decided, that the grant does not pass the title of the reserved lands to the grantee "*subject only*" to the prior claims, but, on the contrary, no title whatever to the reserved land passed under the grant. But as the question here suggested does not properly arise in the case under consideration, it is not intended to decide whether the apparent doctrine announced in *Hopkins v. Ward*, has been disapproved, qualified or overruled by the subsequent cases; or whether or not that case is now law in this State, and if the law, what is its proper construction and effect. These questions are not now before us and are not decided.

The plaintiffs in the case at bar claimed title under a grant within the boundaries of which six thousand seven hundred and eighty-six acres are excepted for prior claims, to this excepted land the said grant passed no title whatever; the defendants claimed, and the jury has found, that the one thousand one hundred acres in controversy, was a prior claim lying within the boundaries of the plaintiffs' grant; consequently, the one thousand one hundred acres was a part of the excepted land and no title passed under the plaintiffs' grant to it. And the plaintiffs, having never had any "just claim legal or equitable" to any part of said one thousand one hundred acres, "held or derived from or under any grant of the commonwealth," they, or those under whom they claim, were not in a position to take the forfeited title of the Gallatin survey under the act of March 22, 1842, and the court properly so instructed the jury.

For these reasons I am of opinion, that the judgment of the circuit court be affirmed with costs to the defendants in error and thirty dollars damages.

THE OTHER JUDGES CONCURRED.

JUDGMENT AFFIRMED.

21	76
30	322

WHEELING.

REINHARDT, Ex'r., v. REINHARDT *et al.*

Submitted June 9, 1882—Decided December 2, 1882.

1. Section 7 of chapter 86 of the Code, confers upon the personal representative of a decedent the right to bring a suit in equity, as in said section provided, either before or after the expiration of six months from his qualification ; but he cannot bring such suit *after* six months, if any creditor has, before such representative commences his suit, filed a creditor's bill as provided for in said section. (p. 79.)
2. A husband conveys real estate to a trustee to secure the payment of a debt and the wife unites in such conveyance ; after the death of her husband, a creditor's bill is filed to subject the real estate of said husband to the payment of his debts and the said trust property is sold under a decree in said suit. **HELD :**
The widow is not entitled to dower in the property so conveyed or the proceeds thereof, unless there is a surplus after paying said trust debt and such costs as are properly chargeable to the fund arising from the sale of the property so conveyed. (p. 80.)
3. A husband dies seized of real estate and owing debts exceeding the value of all his estate, personal and real, leaving a widow and infant children. The widow as guardian of said children files a declaration of homestead on a part of said real estate after the death of the husband. **HELD :**
That the widow and children took said real estate subject to the liens and equities against it in the hands of the husband, and said declaration does not exempt it, or any part of it, from the debts contracted by the husband and due from his estate. (p. 81.)

Appeal from and *supersedeas* to a decree of the circuit court of the county of Ohio, rendered on the 29th day of December, 1880, in a cause in said court then pending, wherein Henry Reinhardt's executor was plaintiff and Mary Jane Reinhardt and others were defendants, allowed upon the petition of the said Mary Jane Reinhardt.

Hon. Thayer Melvin, judge of the first judicial circuit, rendered the decree appealed from.

SNYDER, JUDGE, furnishes the following statement of the case:

Henry Reinhardt departed this life in December, 1878, possessed of a very inconsiderable personal estate, but seized of a house and lot on Coal street, in the city of Wheeling, and two lots of land on Glenn's run in Ohio county, one of ten and the other of about nine acres. On the two Glenn's run lots he in his lifetime gave a trust deed to secure the payment of six hundred and fifty-nine dollars and twenty-five cents with interest from March 5, 1878, which was recorded on the same day and also another trust deed on the said nine acres to secure the payment of a note of six hundred and fifty dollars, dated March 11, 1878, with interest from date and payable five years after date. This deed was recorded April 1, 1878. In both these deeds his wife, Mary J. Reinhardt, united in due form. The aggregate of the debts due from his estate, including the two trust debts just mentioned, was about two thousand two hundred dollars. He left a widow the said Mary J. and four infant children. Ferdinand Reinhardt, the holder and owner of said two trust debts, qualified as his executor, and on October 31, 1879, brought this suit in his own right and as such executor in the county court of Ohio county to settle his testator's estate, ascertain the amounts and priorities of the debts and sell the real estate to pay the same, making the said widow, infant children and creditors of the testator defendants to the bill.

The widow filed her answer, stating therein that she was entitled to dower in the real estate of her husband and that she was willing and desired to take a sum in gross in lieu of dower in kind; that she had been appointed guardian for the infant children of her husband, and for herself and as such guardian had recorded in the clerk's office of said county, on January 15, 1880, a declaration and claim of homestead on said house and lot on Coal street in the city of Wheeling, and insisted that she as such widow and guardian was entitled to hold the same exempt from the debts of her husband in pursuance of article 6 section 48 of the Constitution and of chapter 193 of the Acts of 1872-3 of this State. The infant defendants by their guardian *at litem* demurred to, and also answered, said bill. The court referred the cause to a commissioner to settle the accounts of the executor, to have the creditors convened, the debts and their priorities and the

value in gross of the widow's dower in the real estate of the testator ascertained. The commissioner made and filed his report, showing that the personal estate did not exceed two hundred dollars, all of which was allowed the widow as exempt from the debts, also the amounts and priorities of the debts, and stating that the widow was entitled to 68.538 *per cent.* of the one third of the proceeds of the real estate in lieu of her dower after deducting the taxes and liens thereon and a proper proportion of the costs. This report was by a decree made July 3, 1880, confirmed without exception, the demurrer to the bill overruled and a sale of the real estate directed. The sale was made by a commissioner, on August 14, 1880, and he filed his report which shows that the plaintiff purchased the ten and nine acre lots on Glenn's run—the former at eight hundred dollars and the latter at four hundred and twenty-five dollars, and that Henry Bronson purchased the house and lot in Wheeling at eight hundred dollars, and that the costs of sale were one hundred and twenty-eight dollars. The defendant Mary J. Reinhardt, widow, excepted to said report and the confirmation of the sale, *first*, because the decree of sale was erroneous, and *second*, because the homestead claimed in her answer had not been set apart for her and the infant children.

The court by its decree, made Sept. 24, 1880, overruled said exceptions and confirmed said sale and report; and after reciting that the trust-liens, with three fourths of the costs of suit and sale; exceed the proceeds of sale from the said ten and nine-acre lots, decided the widow was not entitled to any dower therein, but directed that she be paid one hundred and sixty-seven dollars and two cents in lieu of her dower in the Coal street house and lot, that being 68.538 *per cent.* of one third of the proceeds of the said house and lot after deducting the taxes thereon for 1880 and fifty-four dollars and sixteen cents being the one fourth of the expenses of sale and costs of this suit, and ordered a writ of possession to issue to put the purchaser in possession of said house and lot. From the said decrees of July 3, 1880, and September 24, 1880, the said widow in her own right and as guardian of the infant-defendants appealed to the circuit court of Ohio county, which court by a decree made December 29, 1880,

affirmed said decrees; and from said latter decree the said Mary J. Reinhardt as such widow and guardian was allowed an appeal and *supersedes* by this Court.

Robert White for appellant.

Louis F. Stifel for appellee cited 13 W. Va. 698; *Bogges* v. *Robinson*, 5 W. Va. 413; Code ch. 65 § 8.

SNYDER, JUDGE, announced the opinion of the Court:

A number of errors are assigned in the petition for the appeal to this Court, but all of them, except those hereinafter noticed, were very properly abandoned by the counsel for the appellant in his argument before this Court. The assignments thus abandoned, being clearly untenable, I shall, therefore, consider those only which were relied on by the counsel before this Court.

The first error so relied on is, that the county court improperly overruled the demurrer to the plaintiff's bill. In support of this assignment it is insisted, that section 7 of chapter 86 of the Code of this State confers upon the personal representative the right to institute a suit to sell the real estate of his decedent within six months after his qualification, and *not after*.

This, it seems to me, is not the true interpretation of said statute. It provides, generally, that when the personal estate is insufficient for the payment of the debts of the decedent, the executor or administrator may commence and prosecute a suit in equity to subject the real estate to the payment thereof. Then in the succeeding sentence it provides that, "If such suit be not brought within six months after the qualification of such executor or administrator, any creditor of such deceased person" may institute and prosecute such suit on behalf of himself and the other creditors of such decedent. The right of the personal representative to bring such suit is not limited to the period of six months, but if he fails to bring the suit within that time any creditor may do so, and after suit is thus brought by a creditor the right of the personal representative to sue is lost. But such representative may bring such suit either before or after the expi-

ration of six months, unless after the expiration of said time some creditor brings such suit, then the right of such representative to sue becomes superseded by the creditor's suit and he can not bring such suit thereafter. The court properly overruled said demurrer.

Second—It is insisted that the only specific lien on the lot of ten acres on Glenn's run was the trust-debt of six hundred and fifty-nine dollars and twenty-five cents, and that this debt on the day the lot was sold was forty-three dollars less than the price for which it sold, and that the widow was entitled to dower in this forty-three dollars. The fallacy of this claim arises from the fact, that no allowance is made for the costs of suit and expenses of sale which must be paid out of the proceeds of this lot. These costs appear to be one hundred and eight dollars and thirty-two cents, which is the one-half of two hundred and sixteen dollars and sixty-five cents the whole costs of suit and expenses of sale, as shown by the record. This added to the said debt would make the aggregate exceed the eight hundred dollars for which this lot sold. The trust-creditor would undoubtedly have had the right to have sued in equity to enforce his lien on this lot, and in such suit recovered his costs as a part of his debt. Of this the widow could not complain, because she had united in the trust-deed which created the lien—*Holden v. Bogges*, 20 W. Va. 62.

It is, also, contended that there was one hundred and eight dollars in the control of the court arising from the rents of these two Glenn's run lots and that the widow was entitled to the one-third of this sum. The record shows that only twenty-seven dollars of this rent was collected, the balance having been turned over by order of the court to the purchaser of the lots—the twenty-seven dollars being all the rent which accrued prior to the sale. But the widow was in possession and had the use of the house and lot in Wheeling during the time this rent accrued, and the house and lot thus in her use and possession, being more than one-third of the real estate of which her husband died seized and the result showing that she was in fact dowable in no part of these Glenn's run lots or the proceeds thereof, she was not entitled to any part of the rent arising from the said Glenn's run lots.

Third—It is insisted that the court improperly deducted sixty-eight dollars and thirty-four cents from the eight hundred dollars for which the house and lot in Wheeling was sold, and allowed her dower only in seven hundred and thirty-one dollars and sixty-six cents the residue thereof. The record shows that the items which constitute this sixty-eight dollars and thirty-four cents, are five dollars for executing deed to purchaser, nine dollars and eighteen cents for taxes which accrued on said property after the death of the testator and while the same was occupied by the widow, and fifty-four dollars and sixteen cents, the one-fourth of the costs of this suit and expenses of sale. The amount of which the widow was thus deprived, if erroneous, would be but fifteen dollars and seventy-five cents, that sum being equal to 68.538 *per cent.* or one-third of said sixty-eight dollars and thirty-four cents. A sufficient reply to this assignment would be the maxim, *de minimis lex non curat*. But as the widow consented to the sale of the property including her dowable interest and as it is not certain the creditors could have sold her interest without such consent, the expenses of the sale to the extent, at least, of the commissions on the sale of and advertising her interest and the costs of ascertaining the sum in gross to which she was entitled were incurred by reason of her consent and desire to have such gross sum. *Simmons v. Lyles*, 27 Gratt. 922. Moreover, the question of costs in equity is a matter of discretion in the court, and unless the record plainly shows that this discretion was abused by the court below, this Court will not interfere either to correct or reverse the decree for such cause, especially if the decrees appealed from are in other respects affirmed. *Bogges v. Robinson*, 5 W. Va. 413.

Fourth—It is claimed that the court erred in not setting aside the house and lot on Coal street in the city of Wheeling as a homestead for the infant children under the provisions of chapter 193 Acts of 1872-3.

The said statute—section 10—declares: "That no person, after the first day of March next (1874), who has not made and had recorded such declaration of intention, shall have the benefit of such homestead *as to debts contracted before the recording of such declaration.*"

In *Speidel v. Schlosser*, 13 W. Va. 686, this Court decided that said section 10 of said statute was constitutional. And after declaring that the statute applied and was intended to benefit in succession three classes: first, husbands; second, parents; and third, infant children of deceased parents, the court in the same case, on page 698, says: "Each class, as it succeeds the other, respectively, may hold the homestead 'subject to such regulations, as shall be prescribed by law.' As each class steps into the shoes of its predecessor, it has the right to assert the homestead subject to said regulations; but if the property has been obtained from, or through the preceding class, or classes, the homestead *will be subject* to such liens and *equities*, as surrounded it in the hands of such preceding class or classes."

In the case at bar the husband before his death, which occurred in December, 1878, contracted debts to an amount greatly in excess of all the property owned by him. He died owing these debts, a part of which are the very debts from which it is now sought to exempt the house and lot in question. The said house and lot were the property of the husband or father when he contracted said debts, and the only title to it now claimed by his infant children was derived by them from him by descent or devise, and the declaration of an intention to claim said property as a homestead was not filed until January 15, 1880, long after said debts had been contracted and after the death of the husband and father. The infant children, consequently, took the property subject to said debts and are not entitled to hold it as a homestead exempt from said debts.

I have carefully examined the whole record in this cause and find no errors to the prejudice of the appellant either as widow or guardian of the infant children of the decedent. The decree of the circuit court affirming the decrees of the county court is, therefore, affirmed with costs to the appellees and thirty dollars damages against the appellant Mary Jane Goughan formerly Reinhardt, and this cause is remanded to the said circuit court for further proceedings according to the principles of equity.

THE OTHER JUDGES CONCURRED.

DECREE AFFIRMED—CAUSE REMANDED.

WHEELING.

LIVESAY v. FEAMSTER *et al.*FEAMSTER v. TYREE *et al.*FEAMSTER v. HARRIS AND RUCKER, COM'RS, *et al.*

Submitted January 19, 1881—Decided December 2, 1882.

(*SNYDER, JUDGE, Absent.)

1. In a suit brought by a judgment-creditor to enforce his judgment-lien he should make formal defendants to the suit all creditors, who have obtained judgments against the debtor in the courts of record in the county wherein the lands lie, which he seeks to subject, and if he fails to do so, he should in the order of reference in the cause provide for calling in all judgment-creditors of the debtor by publication; and if this be not done, this court in such a case will reverse an order of the court confirming the commissioner's report and ordering a sale of the debtor's lands. (p. 99.)
2. A judge in vacation may dissolve an injunction, though some formal parties defendants have not answered the bill, when an answer has been filed by the substantial defendants in the bill, which denies all the material allegations of the bill, and no proof has been taken to sustain the bill. (p. 103.)
3. Opinion of Green, Judge, as to the parties, on whom it is necessary for a commissioner in chancery to serve a notice, and as to the measure of accuracy required in order to make such notice sufficient, if objected to in court below. (p. 99.)
4. Opinion of Green, Judge, as to when a person, who had not been served with notice in the court below, would be permitted to appear in the Appellate Court and waive errors and ask, so far as he was concerned, an affirmation of a decree in the court below. (p. 101.)

Appeal from certain decrees of the circuit court of Greenbrier county, rendered respectively on 19th day of October, 1878, on the 16th day of November, 1878, and on the 12th day of February, 1879, in three several causes in said court then pending, in the first of which J. J. Livesay was plaintiff, and J. A. Feamster and others were defendants, in the second of which J. A. Feamster was plaintiff and Samuel Tyree and others were defendants, and in the third of which J. A.

*Cause submitted before Judge S. took his seat on the bench.

21	83
43	227
21	83
45	163
21	83
52	600

Feamster was plaintiff and Harris and Rucker, commissioners and others were defendants, with a *supersedeas* to so much of said decrees as orders the sale of certain lands of said Joseph A. Feamster, allowed upon the petition of said Feamster.

Hon. Homer A. Holt, judge of the eighth judicial circuit, rendered the decrees appealed from.

GREEN, JUDGE, furnishes the following statement of the case :

At August rules 1878, Joseph J. Livesay filed his bill in chancery in the circuit court of Greenbrier, in which he set out, that on May the 28th, 1878, he recovered a judgment in the circuit court of said county for one hundred and forty-two dollars and fifty cents, with interest thereon from the date of its recovery and costs of suit nine dollars and fifty cents, against Joseph A. Feamster, which remained unpaid; a copy of which was filed with the bill. The bill alleges, that Joseph A. Feamster, was the owner of three tracts of land in fee in said county; the first, a tract of land of five hundred acres, devised to him by his father's will, a copy of which was filed with the bill; the second, a tract of land of twenty-eight acres near Lewisburg, a copy of the deed for which to him was filed in the bill, and the third, a lot of ten acres also near Lewisburg, a copy of the deed for which to him was also filed in the bill. The bill further states, that on February 24, 1876, Joseph A. Feamster executed a deed of trust to John W. Harris, trustee, conveying this five hundred acre tract in trust to save harmless, his sureties, Austin Handley and Harvey Handley, endorsers of a note drawn by him for one thousand three hundred dollars, dated February 29, 1876, and payable eight months after date, and on May 5, 1876, he executed another deed of trust to Samuel Tyree, trustee, conveying the same tract of land to secure a bond of four thousand six hundred and thirty-eight dollars and three cents, payable the 13th of April, 1876, to Joseph Feamster; and February 3, 1877, he executed a third deed of trust on the same land to John W. Harris, trustee, to secure a bond of one thousand three hundred dollars dated February 3, 1877, with interest from October 30, 1876, and

payable October 30, 1877, to Sarah Smithee; which bond was executed by John A. Feamster as principal, and Samuel Tuckwiller as security. Official copies of all these deeds of trust, which were promptly recorded, were filed with bill.

The bill further alleged, that the first of these deeds of trust had been discharged, the debt being satisfied and that the greater part of the debt secured by the last of these deed of trusts had also been paid. The bill states, that Joseph Feamster had died leaving a widow, Sarah A. Feamster, and two children, Joseph Feamster and Laura Feamster, his heirs, and that John W. Harris had qualified as his administrator; and that the rents and profits of these lands would not satisfy the liens in five years, and that the plaintiff is informed, that there are other liens on these lands, but that he does not know what they are nor all the persons to whom due.

The bill prayed, that the following parties be made defendants: Joseph A. Feamster, Austin Handley and Harvey Handley, Sarah Smithee, John W. Harris, trustee, and also administrator of Joseph Feamster, deceased, Samuel Tyree, Sarah A. Feamster, Joseph Feamster, Laura Feamster and Samuel Tuckwiller; and that the plaintiff might have a decree for his judgment and interest, and the costs of this suit; that this cause might be referred to a commissioner, to state an account of the liens on the lands of Joseph A. Feamster; that these lands might be sold, or so much thereof as might be necessary, to reach and satisfy the plaintiff's judgment, and for general relief. Joseph Feamster and Laura Feamster, being infants, filed their answer by their guardian *ad litem*, Jonathan Mays. John W. Harris, administrator of Joseph Feamster, filed his answer admitting the truth of the allegations in the bill, so far as they were made with reference to the debt of four thousand six hundred and thirty-eight dollars due to his intestate, and stating, that no part of this debt had been paid.

The summons was issued in this cause against all the defendants named, except Austin Handley and Harvey Handley; and was duly served on all the defendants included in the summons, before the filing of the bill. On the 19th day of October, 1878, the judge of said court in vacation, entered the following order of reference:

"On motion of the plaintiff, notice in writing having been served upon the defendant, Joseph A. Feamster, of the time and place of making this motion, it is ordered that this cause be referred to J. M. McWhorter, a commissioner of this Court, who is directed to take, state and report to this Court at its next term—

"First—The quantity, value and location of all the real estate owned by the defendant, Joseph A. Feamster, at the date of the recovery and execution of the liens in the plaintiff's bill set forth.

"Second—The amount, dignity and priority of all liens upon said real estate, and to whom due.

"Third—All matters deemed pertinent or required by any party to this suit.

"Said commissioner is required to give the parties or their attorneys notice of the time and place for the taking of said account.

"H. A. HOLT."

On the day this order was entered, the commissioner gave notice to all the defendants, that he would execute it on the 2d day of October at his office in Lewisburg. This notice set out the decree correctly, which the commissioner was to execute except, that the plaintiff in the decree was by mistake in this notice called Jesse J. Feamster instead of Jesse J. Livesay. This notice was served on Joseph A. Feamster, on October 19, 1878; and its service was acknowledged the same day by all the defendants excepting only, Samuel Tuckwiller and Samuel Tyree. It was acknowledged by Austin Handley and Harvey Handley, defendants named in the bill, who had not been served with the summons, Samuel Tyree was the trustee in the deed of trust to secure a debt to Joseph Feamster, and while this notice was not served on the trustee it was served on the *cestori qui trust*; and while not served on Samuel Tuckwiller, it was served on his trustee, J. W. Harris. This notice was also acknowledged by the plaintiff the same day, October 19, 1878. The case was before the commissioner but a single day, and on the following day, October 23, 1878, he made his report, in which he states, that the debt named in the bill as secured by the oldest deed of trust had been satisfied, as the trustee in this deed in-

formed the commissioner. The debt secured by the second deed of trust and due to the administrator of Joseph Feamster, was reported as all still due. It amounted, with interest up to November 13, 1878, to five thousand three hundred and fifty-six dollars and ninety-two cents. On the debt of one thousand three hundred dollars due to Sarah Smithee, on the bond of Joseph A. Feamster with Samuel Tuckwiller as surety, the obligee admitted, that there was paid eight hundred dollars on November 22, 1877. The balance due on this debt, with interest to November 13, 1878, was reported as six hundred and seventeen dollars and twenty-one cents.

As the third class, the commissioner reported a judgment against Joseph A. Feamster, in favor of Wm. W. Moore, of one hundred and ninety-five dollars and sixty-seven cents as of November 15, 1878. As the fourth class, a judgment in favor of the plaintiff named in the bill, amounting to one hundred and fifty-six dollars and ninety-one cents, as of same date; and also a judgment in favor of R. P. Lake amounting to three hundred and twenty-nine dollars and eighty-seven cents as of same date. Upon these two judgments brought into this report in favor of Wm. W. Moore and R. P. Lake, executions were issued and levied on sufficient property to pay them, and *venditioni exponas* issued returnable to December rules 1878. The five hundred acre tract was valued at eight thousand three hundred and ninety-eight dollars and ninety-one cents; the tract near Lewisburg containing thirty acres and fifteen poles, at six hundred and sixty-three dollars and sixty cents; and the ten acre lot near Lewisburg at three hundred and fifteen dollars. And it was stated, that either of these last two parcels, would sell for enough to satisfy the plaintiffs' claim.

Before the making of this report Samuel Tyree, trustee in the third deed of trust, at the request of John W. Harris, administrator of Joseph Feamster, advertised for sale on October 30, 1878, the five hundred acre tract conveyed by the deed of trust; and on September 25, 1878, Joseph A. Feamster filed his bill in said court in which he alleged, that the four thousand six hundred and thirty-eight dollars bond secured by this deed of trust, was given by him on a settlement made by him with Joseph Feamster, in his lifetime;

that this settlement was erroneous and he was entitled to credits, which were not allowed him; that he had two receipts he had lost, one of which he has since found, amounting to three hundred and eighty dollars and sixty-two cents. It is filed and is a receipt for this amount, dated May 7, 1868, being as it says the "amount paid to C. W. McClung, on a claim due from Joseph Feamster as guardian of McClung, and to be credited on a debt due to Joseph Feamster from Joseph A. Feamster and others. The other receipt the bill states could not be found. But he has found a witness, by whom he can prove, that he had before the settlement paid Joseph Feamster about eight hundred dollars on this settlement. He further states, that on the — day of August, 1877, he paid to Joseph Feaster, two thousand seven hundred and sixty-three dollars, to be credited on this bond of four thousand six hundred and thirty-eight dollars and three cents the receipt for which he filed and which was as follows :

"\$2,763. Received of Jos. A. Feamster, two thousand seven hundred and sixty-three dollars in bond, receipts and money, for which you are to give me a credit on a bond you hold on me, and the balance of the bond you can have from six to eight years to pay it in, paying the interest when demanded if I think it good. This — August, 1877.

JOSEPH FEAMSTER."

The bill states, that after these three credits of three hundred and eighty dollars, with interest from May 7, 1868, and eight hundred dollars and this two thousand seven hundred and sixty-three dollars and sixty-two cents as of August, 1877, have been given, the balance of the debt would be promptly paid. The bill prays an injunction to said sale, till this settlement has been corrected and these credits allowed him; and for general relief. This bill was sworn to. The injunction was awarded on an injunction bond, in the penalty of three thousand dollars being given with good security. This injunction was granted September 25, 1878, and the injunction bond given. John W. Harris, the administrator of Joseph Feamster, filed his answer sworn to, October 7, 1878. He affirms, that on his information and belief, and he so charges, that this bond of four thousand six hundred and three-eighth dollars and three cents, secured by this deed of trust, was given after a

full settlement of all accounts; that it extended over several days and all proper credits were given Joseph A. Feamster, and no mistakes made in it, and if he was entitled to a credit for this three hundred and eighty dollars and sixty-two cents it was given him; that the receipt for this sum he believes, but does not admit, was signed by Joseph Feamster. But the receipt for two thousand seven hundred and sixty-three dollars, he denies was signed by him and further states, that when it was dated August, 1877, his intestate was very infirm, being confined to his house and unable to attend to any business; that his hand-writing was then nervous, infirm and shaken, and so unlike the signature to this receipt, as to satisfy him it was false and pretended; and he emphatically affirms that it is not genuine; that the plaintiff at the date of this receipt, August, 1877, was pressed in pecuniary matters, and had been a borrower of money; that a number of executions had been levied on his property, and in the respondent's opinion, could not have raised any considerable sum; that as to the pretended bond and receipts, named in this pretended receipt of August, 1877, that none such came into his hands as administrator of Joseph Feamster, nor any assigned bond, nor any receipts or papers referring to any transactions with the plaintiff, except the unsettled bond secured by this deed of trust.

Samuel Tyree, the trustee, also filed his answer in which he simply admits, that he was proceeding to sell this five hundred acre tract as trustee, to pay this debt, when he was enjoined. This answer was by consent filed, without being sworn to by him.

On October 5, 1878, a notice was served on Joseph A. Feamster, that on October 19, 1878, he would move the judge of said court in chambers, at the clerk's office of said county, to dissolve this injunction. Replications were filed to these answers, and on these pleadings the judge on October 19, 1878, made an order dissolving this injunction. And on November 16, 1878, at the next term of the court, a decree was made in these two causes. In the first of them on the bill taken for confessed, as to all the defendants excepting those, whose answers we have stated were filed; and on these answers and replications to them, the report of Com-

missioner McWhorter, before referred to, and to which there was no exceptions, and the second of these causes was heard on the pleadings above stated; on consideration whereof the report in the first of these causes was confirmed and the bill in the second of causes was dismissed, and it was ordered, that the defendant J. W. Harris, administrator, &c., recover his costs. It was further ordered, that John W. Harris, administrator of Joseph Feamster, deceased, and Sarah Snithee, respectively recover of Joseph A. Feamster, the sums of money due them, as set out in said report, with interest on said sums from November 13, 1878; and that plaintiff J. J. Livesay, recover his costs. And unless said Joseph A. Feamster, should within ten days pay the debts named in said report, that Wm. P. Rucker, and John W. Harris, as special commissioners either of whom might act, should sell the plaintiff's land in the bill named, or so much thereof as might be necessary; selling first the five hundred acre tract. The terms of sale fixed were, cash sufficient to pay the costs of suits and expenses of sale, and the residue in six, twelve and eighteen months, with interest from the day of sale, taking from the purchaser bonds with good security for the deferred payments.

The land was to be sold in front of the Lewisburg hotel, after advertising the time, place and terms of sale, for four successive weeks in some newspaper published in Greenbrier county. They were required also, before receiving any money, to give bond and security in the penalty of ten thousand dollars as required by law.

On January 1, 1879, the plaintiff Joseph A. Feamster, filed another bill asking an injunction to prevent the said commissioners from selling said lands, under this decree, which they had advertised for sale on the 2d day of January, 1879. They, as well as John W. Harris administrator of John Feamster, were made defendants to the bill. The bill reiterates the allegations of his former bill of injunction, and states the proceedings, which had been up to that time had in these causes, and alleges as additional facts, that he gave notice that on the 17th of October, 1878, at the office of Dennis and Dennis, in the town of Lewisburg, he would take depositions to support his original bill

of injunction, which he had been notified the defendants would ask to have dissolved on the 1st day of October, 1878. That he was prevented by sickness, on the 17th day of October, 1878, from taking his depositions; that on that day and for several days thereafter, he could not ride to the town of Lewisburg. To sustain this, he files the affidavits of James M. Stone, Charles W. Stone and himself. In his affidavit he states, what is on this subject alleged in the bill, and that he was too sick to ride to Lewisburg for several days after October 17, 1878. And when he did get there he was informed, that the papers had been submitted to the judge, on the motion to dissolve the injunction, and it was too late to take his depositions to prove the signature of Joseph Feamster to the receipt of two thousand seven hundred and sixty-three dollars.

Charles W. Stone swears, that he lived with Joseph A. Feamster ten or twelve miles from Lewisburg; that he knows that on or about the 17th, 18th or 19th days of October, 1878, Joseph A. Feamster was sick, confined to his bed and room, and too unwell to go to Lewisburg. And James M. Stone swears, that he lived two miles from Joseph A. Feamster's house, that on or about the 17th, 18th or 19th of October, 1878, he came to his house on his way to Lewisburg, but he was too sick to go further and he took him back home. He was too unwell to attend to any business, or to ride to town; and that he was unwell for some days afterwards. To support his allegations of the genuineness of this receipt of Joseph Feamster for two thousand seven hundred and sixty-three dollars, he files the affidavits of Samuel C. Ludington, John A. Feamster, S. W. N. Feamster and Thos. L. Feamster. They swear, that they severally are acquainted with the handwriting of Joseph Feamster, and most of them say well acquainted with his handwriting, and that the signature to the receipt of two thousand seven hundred and sixty-three dollars is in their opinion, his genuine signature. This bill prays for these reasons, that the injunction theretofore awarded might be reinstated, or a new injunction awarded to restrain these commissioners from selling his lands, until these matters are settled and he gets his credits for these two receipts of three thousand eight hundred dollars

and sixty-two cents, dated May 7, 1868, and two thousand seven hundred and sixty-three dollars as of August 1877; and it asks for general relief. This bill was sworn to. This injunction was awarded as prayed for on January 1, 1879.

John W. Harris, the administrator of Joseph Feamster, filed his answer to this bill called an amended and supplemental bill, which was sworn to by him January 10, 1879. This answer repeats the statements made in his answer to the first bill of injunction, and states that he is informed and charges, that Joseph A. Feamster was in the town of Lewisburg a few days before and a few days after October 17, 1878, and that he was there on October 19. The court did not meet till October 25, 1878, and the decree dismissing the first bill of injunction was not entered till November 16, so that he had ample opportunity to take his depositions and reinstate his injunction. He claims that in the first of the above causes the report of the commissioner fixing the lien of the whole of this debt secured by this deed of trust, had been confirmed by this Court, there being no exceptions to it; though the plaintiff had opportunity to object if he had thought proper. And thus the whole matter is now *res adjudicata* and ought not to be reopened.

On January 24th, a notice was served on Joseph A. Feamster, that the defendant J. W. Harris would move to dissolve this last injunction on the 27th of January. On that day on the motion of the plaintiff, the hearing of this motion to dissolve this injunction was continued till February 12, 1879. And on that day, the cause being heard in vacation on this motion and on all the pleadings and orders in said causes hereinbefore stated, and said answer last named and replication thereto, and numerous depositions and exhibits filed in the cause, on consideration whereof the judge sustained the motion to dissolve, and the injunction awarded Joseph A. Feamster on January 1, 1879, was dissolved and this decree was certified to the clerk of the court to be entered and was entered. No less than fifty-two depositions were taken and no less than forty-nine exhibits filed with them. The great majority of these depositions were taken to prove, where Joseph A. Feamster was on the 17th, 18th and 19th days of October, 1878, when he claims he was sick at home,

and unable to go to Lewisburg to attend to the taking of depositions in this cause; and on the question, whether the signature of Joseph Feamster to the receipt dated August, 1877, for two thousand seven hundred and sixty-three dollars was or was not genuine.

These depositions cover two hundred and seventy-five pages of the manuscript record, and nothing can be given of them except the general results established by them. They prove conclusively, that Joseph A. Feamster was not sick at his home on the 17th, 18th or 19th days of October, 1878, or for some days certainly before and after that time. He was in the town of Lewisburg on October 14, 1878, and also the next day, October 15th. He was in Alderson on the 16th, some five or six miles from his house. On the 17th, the day appointed by him to have depositions taken to sustain his injunction, he was again in Alderson; and on the next day the 18th, he was again in Lewisburg, and he was again there on the 19th, and on the 21st, he was again in Alderson. The conclusion is inevitable, that the affidavits filed with his second bill with reference to his sickness assigned as the reason for not having attended to these causes at the proper time, are utterly false. There would seem to be no foundation for it except, that he was probably to some extent, drunk on the 18th of October, 1878, but not sick, as he went to Alderson and back that day, a distance of ten or twelve miles.

On the question of the genuineness of the signature to the receipts claimed in Joseph A. Feamster's bills to have been signed by him, it was clearly proven, that he signed the receipt for three hundred and eighty dollars and sixty-two cents dated May 7, 1868. Nine witnesses testified, that they were more or less acquainted with his signature, and believed that signature to the receipt for two thousand seven hundred and sixty-three dollars dated August, 1877, was in his handwriting; of these, two of them were lawyers and one a deputy sheriff; the others were not, I presume, familiar to any considerable extent with handwritings, and I cannot attach a great deal of importance to their judgment, especially as it is proven, that Joseph Feamster himself wrote but little other than his signature, though it was quite uniform

for one who wrote so little. On the other hand twelve witnesses, also more or less acquainted with his handwriting testified, that in their opinion the signature to this receipt was not in his handwriting. Of these two were merchants, two lawyers, one a sheriff, one a deputy sheriff, one the clerk of a court, one a commissioner in chancery, one the teller of a bank and one the cashier of a bank, while only three of them were men, whom from their employments I would not suppose could form an accurate judgment in the matter. I am of opinion, that the very decided weight of the evidence is against the genuineness of the signature of Joseph Feamster to this receipt. This conclusion is strongly corroborated by the proof which is clear, that he was in no condition physically to transact any business during the month of August 1877, when this receipt is dated. He was in a very weak condition during the whole of that month. During the first eight or ten days he was confined to his bed a portion of the time, and was up sometimes, but confined to the house, an invalid requiring constant attention, being very weak from continual chronic dysentery. After the first eight or ten days of August he became so much prostrated, that he was confined to his bed altogether and died on the 10th of September 1877; being in an almost insensible condition for several days before his death.

The signature to this receipt all the witnesses agree, was in as firm and steady a handwriting as when he was in perfect health, and it is almost certain had he signed his name at all during the month of August, 1877, it would have been in a trembling and unsteady hand-writing, markedly different from his writing when in health.

But it is certain he did not sign this receipt in August, 1877. It is clearly proven, that he was at home in this sickly condition during the whole of that month, and that Joseph A. Feamster was not there during that month, nor was he there but once afterwards on September 8, two days before the death of his uncle Joseph Feamster. Again it is proven, that he died on September 10, 1877, and left no money of any account. Had he received any large sum in the month of August just preceding his death, it must have been in his possession at his death, nor was there found among his papers

any such bond, as in his testimony Joseph A. Feamster says was the one transferred to him, and referred to in this receipt of August, 1877, nor any such receipts as are referred to in it. In fact no papers having any connection with Joseph A. Feamster were found, except the bond secured by the deed of trust on which there was no credit.

In fact the bond, said by Joseph A. Feamster to have been referred to in this receipt, appears never to have had an existence. Again the conduct of Joseph A. Feamster with reference to this receipt, would be hardly consistent with a supposition that it was a genuine paper. One one occasion, after the institution of the suit by J. J. Livesay against him, he showed to a lawyer the name of Joseph Feamster appended at the foot of this receipt, but he concealed from him the body of this receipt, showing him nothing but the signature and refusing to let him see the body of the receipt. He asked him if this signature of Joseph A. Feamster was in his Joseph A. Feamster's handwriting, The lawyer said it was not. He then showed him the endorsement on the back of this receipt of Joseph A. Feamster, and asked him if that was not his handwriting; and he told him it was. He then asked him if he did not remember, that this paper was drawn up and signed right there, slapping his hand on the office table. He was told by the lawyer that he did not. He then said with an oath, "You do remember. You drew it up yourself." It is true he was then quite drunk. He subsequently, at another time when he was also quite drunk, insisted that this receipt had been drawn up in his office. This was just before he obtained his first injunction. He was told by the lawyer that he was sure he had not drawn the receipt, and if it was drawn up at his office he had no recollection whatever of the fact. He then said "No it was not drawn up by you. I drew it up myself and uncle Joe sent it by Moody or Stone or one of them."

The evidence also clearly proved that the settlement which preceded the giving of the bond of Joseph A. Feamster of four thousand six hundred and thirty-eight dollars and three cents, and the deed of trust to secure it, was a settlement of all matters between them. The actual calculations on which this settlement was based, were made prior to April 13, 1876,

and the interest calculated to that date. The bond was dated as of that date to save interest calculation; though the transactions were not closed till May 1, 1876, when the bond and deed of trust were signed by Joseph A. Feamster. There was no evidence tending to show, that there was any mistake in this settlement, or that Joseph A. Feamster was entitled to any credit which was not given to him; or that there was any controversy about the items of this settlement. It is possible but not probable, that the signature to this receipt of two thousand seven hundred and sixty-three dollars dated August, 1877, was the genuine signature of Joseph Feamster, but it is certain from the evidence, that no such transaction as is described in it, took place between Joseph Feamster and Joseph A. Feamster. The body of the paper is in the handwriting of Joseph A. Feamster, and it is possible, that he wrote it over a signature of Joseph Feamster, which he had signed on a blank piece of paper perhaps years before August, 1877. It was shown, that Joseph Feamster did sometimes thus write his name on blank pieces of paper for his amusement, and took no care of them.

An appeal and *supersedeas* was awarded to the order made in vacation on October 19, 1878, and the order of February 12, 1879, and an appeal from the decree of November 16, 1878, and a *supersedeas* to so much thereof as ordered a sale of the land, upon the petition to this Court of Joseph A. Feamster. Henry Handley and Austin Handley, appellees, on the 5th day of March, 1881, appeared before this Court, reasonable notice thereof having been given the appellant and his counsel, and moved this Court for leave to enter their formal appearance as parties defendants in the first named cause; and to file a release of the said Harvey Handley and Austin Handley, of the deed of trust in said cause named in which they are *cestui qui trusts*. And the appellant by his attorney appeared and objected to the same, and this motion was argued and submitted to this Court for its decision, and is now to be acted upon at the same time that this appeal is considered and determined.

Davis & Dennis for appellant cited 15 W. Va. 292; 5 J. J. Mar. 249; 6 Gratt. 49; 6 Leigh 166; 11 Leigh 85; Kelly's

Stat. p. 299, ch. 22, § 5; 6 Gratt. 174; 20 Gratt. 244; 21 Gratt. 334; 4 Rand. 175; 9 W. Va. 299.

John W. Harris for appellees cited 22 Gratt. 405; 7 W. Va. 348; 31 Gratt. 323; 19 Gratt. 354; 26 Gratt. 549; 10 W. Va. 299; 12 W. Va. 215; 14 W. Va. 531; 7 W. Va. 217; 11 Wall. 299; 16 Wall. 331; *Parsons v. Thornburg*, 16 W. Va.; 24 Gratt. 272; 32 Gratt. 843; 9 W. Va. 301, 307; 12 W. Va. 641; 11 W. Va. 156; 15 W. Va. 831; 1 Lom. Dig. 527; 10 Leigh. 395.

GREEN, JUDGE, announced the opinion of the Court:

These two causes are so far distinct, as to make it suitable to consider them at first separately and then conjointly, so far as the decree of November 16, 1878, which was rendered on them jointly is concerned. And we will first consider the cause first instituted; the cause which J. J. Livesay was plaintiff. It was simply a bill brought by J. J. Livesay, to enforce the lien of a judgment of the circuit court of Greenbrier in his favor, against Joseph A. Feamster. The bill was filed at August rules, 1878. It made as it should have done, the trustees and *cestuis que trust* in the several deeds of trust, which had been executed by Joseph A. Feamster on his largest tract of land, parties defendants. And it stated, that one of these deeds of trust, in which the Handleys were the *cestuis que trust*, had been fully satisfied. And it further charged, "that there were other liens on the lands aforesaid, besides those hereinbefore mentioned, but does not state their amounts and priorities, nor to whom all are due."

The summons was served on all the defendants named in the bill, except the Messrs. Handley; and it was served on the trustee in the deed of trust from Jos. A. Feamster for their benefit. A motion was made by the plaintiff, after Joseph A. Feamster and the other defendants had been served with notice, that the judge would make an order of reference in vacation; and on this motion on October 19, 1878, the judge did refer the cause to the commissioner of the court to report first, the value of the defendant Joseph A. Feamster's lands; second, "the amounts, dignity and priority of all liens upon said real estate and to whom

due;" third, all other pertinent matters. The commissioner forthwith gave notice to all the parties to the suit, including the Messrs. Handley, excepting only one of the trustees in one of the deeds of trust; but the *cestui que trust* in this deed of trust was one of the parties notified, and excepting the *cestui que trust* in one of the deeds of trust, in which the trustee was one of the parties notified. Only three days notice, including Sunday, was given of the purpose of the commissioner to execute this order of reference. And he executed it in a single day. He was not required by the decree to advertise for judgment lienors or others to present their claims, but was only required to give the parties to the suit or their attorneys notice.

On November 16, 1878, there having been no exceptions filed to the commissioner's report, it was confirmed. Two judgments were reported as liens on this land, binds the plaintiffs. One in favor of Wm. W. Moore, and the other in favor of R. P. Lake, neither of whom were parties to the suit. And the commissioner also reported, that the deed of trust in favor of the Messrs. Handleys was satisfied, and that on the last two judgments, executions had been issued and levied on sufficient property to satisfy them. This decree took the bill as confessed against the Messrs. Handleys, though they had never been summoned. Their trustee had before the commissioner as appears by his report admitted, that the deed of trust in their favor had been fully paid. This decree adjudged, that the amounts stated to be due in this report to the defendants in the bill, whose debts were secured by deeds of trusts, should be paid, but not the debt due the plaintiff by his judgment, nor the other debts due persons not parties to the suit, but who had judgment liens. And it then ordered, that unless Joseph A. Feamster, or some one for him, paid within ten days all the debts named in the commissioner's report, as well as the costs of the suit, that the commissioners named should sell his lands for so much cash as would pay the costs of the suit and expenses of sale, and the balance on a credit of six, twelve and eighteen months, with interest from the day of sale taking, from the purchaser bonds with approved security; but not directing the taking of any liens on the lands

to secure the deferred payments. Proper advertisement of the lands were prescribed by this decree, as well as a proper bond to be given by the commissioner of sales.

These were all the proceedings in this cause. Is there error in this decree? Though the record in this case proper, shows no controversy of any sort, and it was so plain and simple a case, yet there are numerous errors and irregularities in it. The bill on its face shows, that there were judgments on the lands of the debtor other than the plaintiff's, and it was decided in *Neely et al. v. Jones et al.* 16 W. Va. p. 625, syllabus 5, that the plaintiff ought to have made formally defendants in the suit all creditors, who had obtained judgments against the debtor in the circuit court of Greenbrier, where the lands sought to be subjected lie, as well as any other docketed judgments on the judgment-lien docket of that county. The bill however does not clearly show, whether these lienors not made parties belonged to this class; though the subsequent proceedings do show, that these were lienors of this class and that Wm. W. Moore and R. P. Lake, ought to have been properly made formal parties and served with process. Still if no objection had been made in the court below to so proceeding, this error might have been caused by the court in its order of reference, directing the commissioner to call all judgment-lienors before him and audit their claims. See *Neely et al. v. Jones et al.* 16 W. Va. p. 626, syllabus 10, and *Norris Caldwell & Co. v. Bean et al.* 17 W. Va. 655, syllabus 2, sub-division IV and syllabus 3.

The rules laid down in these causes with certain charges and modifications, have been adopted now as a part of our statute-law. See Acts of 1882, p. 359, 360, ch. 126 § 7. This statute-law should of course, be now strictly pursued in proceedings in suits of this character, whether the suits were instituted before or since this law went into effect; and should of course be pursued in this case, when it is again remanded to the circuit court of Greenbrier for further proceedings, as it must be.

The judge in his order in vacation made on October 19, 1878, failed to do anything towards the correction of this error in the bill in failing to make the proper parties, for he did not in this order of reference direct the commissioner to

call before him the judgment-lien creditors by publication, and to audit their claims. Had he done so and thus made these judgment-lien creditors informally parties to the suit, if no objection had been made upon the authority of these West Virginia cases above cited, this Court would not have reversed his decree of November 16, 1878, ordering a sale of the debtors lands, for this error, if no objection had been made, in the court below, as none was made.

The commissioner by this order of October 19, 1878, was directed to give the parties or their attorneys notice of the time and place for the taking of the accounts ordered. This he failed to do. His failure to notify one of the trustees in one of the deeds of trust, though he was a party to the suit, would have been excusable as he really had no interest in the accounts to be taken; but his failure to notify one of the *cestui que trust* who had such interest, was inexcusable, even though he did notify his trustee, who merely held the legal title of land conveyed in trust for the security of his debt. To the parties to whom the commissioner did give notice, he gave but a notice of two days Sunday excepted; and he made up his report in a single day. This did not give the debtor nor the other parties, a fair and reasonable opportunity to produce evidence before the commissioner, and to have the accounts ordered fairly made. And in the notice which he did have served on all the other parties to the cause, except the one to the trustee and one to the *cestui que trust*, he misdescribed the suit by stating the plaintiffs' name as J. J. Feamster, instead of J. J. Livesay. In *Gales v. Miller* 8 Gratt. (*Bowyer v. Knapp*, 15 W. Va. 292), it is laid down, that notice should indicate with reasonable certainty in what cause action is to be taken, and it is probable that this notice was on this account insufficient, had it been objected to in the court below. But this point it is unnecessary to definitely decide as it was not objected to in the court below.

If the report had been excepted to on these accounts, the circuit court ought to have sustained the exception. But as it was not excepted to these objections were waived by all the parties to this suit. See *Peters v. Neville*, 26 Gratt. 549; *Hyman v. Smith*, 10 W. Va. 299; *Anderson v. Nagle*, 12 W. Va.; *McCarthy v. Chalfant*, 14 W. Va. The judgment-credit-

ors, whom the report of the commissioner shows existed not having been made parties, either formally or informally by order of publication, and having had no opportunity of having their debts properly audited, were of course not bound by the decree of November 16, 1878; and the purchaser of lands under that decree might still have had his land so purchased, held liable for the payment of such judgments; and injustice and wrong would thus have been done both to the purchaser and to these judgment-creditors, whose debts were not audited, and wrong would also have been done to judgment-debtor Joseph A. Feamster, as under such circumstances his lands might be sacrificed.

The court therefore erred in confirming the commissioner's report, though not excepted to, and in ordering a sale of the appellant's lands by this decree of November 16, 1878. If there had been no other error in this decree except the taking of the bill as confessed against the Messrs. Handley, though they had not been served with process, it would probably have been affirmed as they appeared before this court and asked a confirmation of it, and asked to be permitted to file in this court a formal release of the deed of trust in their favor. It is true this was objected to by the appellants. Yet despite this objection it would now probably be permitted to be filed, if there had been no other reason for reversing this decree.

Under circumstances quite similar, this court allowed appellees to release errors in this court in the case of *Arnold et al. v. Arnold et al.*, 11 West Va. pp. 455, 456; and on the authority of that case and the cases cited in it, *Craig v. Sebrell*, 9 Gratt. 131, *Moore et al. v. Holt*, 10 Gratt. 284, and *Mustard v. Wohlford's heirs*, 15 Gratt. 329, it is probable, that the motion of the appellees, the Messrs. Handley, to be thus allowed to release errors and file release of this deed of trust, under the circumstances of this case, would be granted, and this decree of November 16th affirmed if there had been no other error in it except that thus released. But as there are other fatal errors in this decree, it is unnecessary for this Court to act on this motion of the Messrs. Handley, and it is therefore not done.

We will now consider the cause of *Joseph A. Feamster v.*

Samuel Tyree, and *John W. Harris*, adm'r of *Joseph Feamster*, heard with the cause above considered, and the continuation of this cause by the bill of *Joseph A. Feamster v. John W. Harris* and *Wm. P. Ruckers*, commissioners of sale under this decree of November 16, 1878; and *John W. Harris*, adm'r of *Joseph Feamster*.

The first of these was to obtain an injunction to prevent *Samuel Tyree*, trustee, from selling the land conveyed to him as trustee, to secure the debt due *Joseph Feamster*. The bill makes no mention whatever of the cause of *J. J. Livesay v. Joseph A. Feamster et als.*, but was based solely on the ground, that the plaintiff *Joseph A. Feamster* was as he alleged, entitled to have corrected the settlement on which his bond of four thousand six hundred and thirty-eight dollars and three cents was given to *Joseph Feamster* and secured by the deed of trust. In this bill *Joseph A. Feamster* claimed credits for two receipts; one for three hundred and eighty dollars and sixty-two cents dated May 7, 1868, and the other for two thousand seven hundred and sixty-three dollars—dated August—1877, and also for eight hundred dollars which he claimed he had paid to *Joseph Feamster* before this settlement, and which were by mistake all omitted to be credited in this settlement made when this bond of four thousand six hundred and thirty-eight dollars and three cents was given by him. The injunction as heard was granted September 25, 1878. The answer of the administrator of *Joseph Feamster*, made on oath, denied all the allegations of this bill, and all the equities of the plaintiff except that it said, that the signature of *Joseph Feamster* to the receipt of three hundred and eighty dollars and sixty-two cents while not admitted to be genuine was probably his genuine signature, but it insisted that if the plaintiff had been entitled to a credit for this in said settlement he had got it, as the settlement was made carefully and deliberately and all credits claimed that were proper were allowed. Notice was given to dissolve this injunction. The trustee *Tyree*, had not answered when this notice was served on October 19, 1878, on this bill and answer and general replication thereto, and the injunction granted was dissolved. *Tyree*, the trustee having filed his answer, and the cause being

heard with the cause of *J. J. Livesay v. John A. Feamster et als.* at the next term of the court; and the decree of November 16, 1868, this bill was dismissed and it was ordered, that John W. Harris, administrator &c., recover his costs. Was there any error in this respect, in this decree? It is claimed, that as the trustee, Tyree, had filed no answer the court could not properly dissolve the injunction. Tyree was a mere trustee, and the only person interested in the debt secured by the deed of trust, which the bill claimed was subject to large credits not given, did file an answer denying all the material facts on which the injunction was based.

There is no rule of a court of equity which requires in every case, that before an injunction will be dissolved on motion, every defendant must answer the bill. If the defendant, who has failed to answer is a formal defendant or if his answer would be in reference only to uncontroverted facts, the court may order the dissolution of an injunction though such an answer has not been filed, if the defendants really interested in the subject of controversy have answered, and deny on oath every material allegation in the bill, and no proof is offered to sustain the allegations of the bill. See *Hayzlett v. McMillan et al.*, 11 W. Va. 464. In addition to McMillan & Leonard, Robinson as well as Hale, sheriff, were made defendants in the bill in that case. See p. 467. Only the parties substantially interested in the controversy, McMillan & Leonard, answered the bill on which the injunction was awarded. See p. 474. Yet the court on motion in vacation dissolved the injunction, and this Court sustained this action. There was therefor no error in the judge of the circuit court dissolving this injunction, by his order of October 19, 1878, made in vacation.

At the next term of the court, the defendant Tyree, the trustee, filed his answer which in no way changed the cause or its merits, and the court on the hearing of the cause by its decree of November 16, 1878, dismissed the bill of Joseph A. Feamster at his costs. This was obviously right, though we have seen in other respects so far as the cause of *J. J. Livesay v. Feamster et al.* was concerned, heard with this cause, this decree was erroneous.

Joseph A. Feamster afterwards, on January 1, 1879, by

his bill called a supplemental and amended bill, again asked the court to reinstate this injunction which had been dissolved, or that an original injunction might be granted him to restrain the commissioners Rucher and Harris, appointed by this decree of November 16, 1878, from selling his lands, which they had advertised. None of these were parties to the cause of *Livesay v. Joseph A. Feamster et al.*, except the administrator of Joseph Feamster. The bill was based on precisely the same facts as were set out in his first bill of injunction, and no other facts are stated except, that in this decree of November 16, 1878, the whole of the bond of four thousand six hundred and thirty-eight dollars and three cents executed to Joseph Feamster, was held to be due to his administrator, and no credits allowed on it. But no other complaint was made of this decree of November 16, 1878, and none of the irregularities we have pointed out in the cause of *Livesay v. Joseph A. Feamster et al.*, were pointed out or referred to. The whole complaint of this bill was, that the large debt due to Joseph Feamster's administrator was entitled to the credits of three hundred and eighty dollars and sixty-two cents, as of May 7, 1868, and of two thousand seven hundred and sixty-three dollars as of August, 1877, as shown by the receipts of Joseph Feamster filed with his first bill of injunction.

In this second bill of injunction no claim even is made to the credit of eight hundred dollars in addition; which was claimed in the prior bill to excuse himself for having failed to take any proof to establish the allegations of his first bill of injunction. The plaintiff alleges that he gave notice to take depositions to sustain these allegations in Lewisburg, on October 17, 1868, and that he was prevented by sickness from taking these depositions then. He files with this bill, his own affidavit and that of two other persons to prove this alleged sickness, and also the affidavits of four other parties to prove the genuineness of the signature of Joseph A. Feamster to the receipt of two thousand seven hundred and sixty-three dollars, dated the — day of August, 1877. The injunction was awarded by the circuit judge as prayed for on January 1, 1869.

The administrator of Joseph Feamster, filed his answer in which he repeats what was said in his former answer to the

first bill of injunction, and denies that Joseph Feamster ever signed this receipt for two thousand seven hundred and sixty-three dollars, dated the — day of August, 1877, and states, that if the plaintiff was ever entitled to any credit for the three hundred and eighty dollars and sixty-two cents named in the receipt of May 7, 1868, he had received it long ago; it being dated some eight years before the settlement was made on which the bond for four thousand six hundred and thirty-eight dollars and three cents was given. And he alleges, that it is not true that the plaintiff was prevented from taking depositions to prove the allegations of his original bill of injunction by sickness, and that he had up to November 16, 1878, opportunity to take their depositions and have his injunction reinstated. This answer was sworn to by the respondent.

A motion was made to dissolve this injunction after due notice, on January 25, 1879, and was by the judge continued till February 12, 1879, when it was dissolved by an order of the judge in vacation. Was there any error in this order dissolving this injunction. There were many depositions taken on both sides as to the controverted facts, and it was proven satisfactorily as we have shown in the statement of the facts in this cause, that the plaintiff Joseph A. Feamster was not prevented by sickness from taking depositions to prove the allegations in his original bill of injunction, prior to its deposition by the vacation order made October 19, 1878; and much less was he prevented from taking such depositions to reinstate his injunction, prior to the dismissal of this suit on November 10, 1878.

There was a great effort made by the plaintiff, to sustain these allegations with reference to his sickness made in this amended or supplemental bill as it is called. And there can be no question, but that much of the evidence given on this point by some of the plaintiff's witnesses was false. But despite this effort it is clearly proven, that these allegations of this amended bill, with reference to the plaintiff's sickness, were false and were made with fraudulent purposes.

The proof with reference to the genuineness of the signature of Joseph Feamster to the receipt for two thousand seven hundred and sixty-three dollars, in August, 1877, was con-

flicting. The weight of the evidence is in favor of this signature not being the signature of Joseph Feamster, and my conclusion is, that it is not; but what is perfectly satisfactory to show, that Joseph A. Feamster is entitled to no credit whatever, as of August, 1877, is, that it is affirmatively proven that he could not have paid Joseph Feamster that sum of money or any part of it, or given him any bond or receipts representing that sum or any part of it in August, 1877. During the whole of the month of August, 1877, Joseph Feamster was very sick, confined to his house, and much the greater part of the time to his bed, and actually died on September 10, 1877. During the month of August, 1877, it is certain, that he never saw Joseph A. Feamster. And he left at his death directly after August, 1877, no money in his possession, and no bond or receipts such as Joseph A. Feamster pretends he gave to him in August, 1877, and included in this false and fraudulent receipt of August, 1877.

The conduct of Joseph Feamster and other circumstances, named in the statement of facts in this case shows conclusively, that this receipt of two thousand seven hundred and sixty-three dollars of date the — day of August, 1877, was a forgery gotten up by Joseph A. Feamster in whose handwriting the body of this receipt was; and that either the name of Joseph Feamster appended to it was forged as was most probably the case, or if not, then that the body of the receipt was falsely and fraudulently written by Joseph A. Feamster over a signature of Joseph Feamster on a blank piece of paper, which he had in some way got hold of. The evidence proved, that the smaller receipt for three hundred and eighty dollars and sixty-two cents, dated as far back as May 7, 1868, was genuine, but that it was given many years before the parties made a fair and full settlement of all matters, when the bond for four thousand eight hundred and sixty-three dollars and three cents was given, and that the plaintiff was entitled to no credit therefor on this bond, nor any other credit. He entirely failed to offer any evidence even tending to show, that any mistake of any sort was made in the final settlement in which this bond was given.

I am therefore of opinion, that the material allegations

contained in this original bill of Joseph A. Feamster, as well as those contained in his amended bill, were utterly untrue in point of fact, and that the cases set up by him in both these bills were based upon fraud and falsehood, and that the circuit court did not err in its order made in vacation in dissolving the injunction awarded on January 1, 1879. Though most of the decree of November 16th must be reversed and set aside, because of irregularities in the preparation of the case on the part of J. J. Livesay in his suit, yet as that part of said decree that dismissed the appellant's bill at his costs must be affirmed, as well as this last order dissolving the injunction awarded on January 1, 1879; and as all the matters really the subject of controversy in the court below were correctly decided by the circuit court, the appellees as the parties substantially prevailing, must recover of the appellants their costs in this Court expended. The order of reference of October 19, 1878, as well as the decree of September 16, 1878, must be set aside, reversed and annulled, except that portion of said decree which dismissed the bill filed by Joseph A. Feamster against Samuel Tyree and J. W. Harris, as administrator of Joseph Feamster, which must be affirmed and all the other orders and decrees entered in these causes must also be affirmed; and the cause of *J. J. Livesay v. Joseph A. Feamster et als.*, must be remanded to the circuit court of Greenbrier with directions to permit the plaintiff to amend his bill, and make the requisite parties defendants as prescribed in section 7 of ch. 126 of the Acts of 1882; and that he proceed further in said cause as prescribed in said chapter and according to the principles laid down in this opinion, and further according to the principles governing courts of equity.

JUDGES JOHNSON AND HAYMOND CONCURRED.

DECREES AFFIRMED IN PART REVERSED IN PART. CAUSE REMANDED.

WHEELING.

LEE & BRO. v. FEAMSTER *et al.*

Submitted January 19, 1881—Decided December 2, 1882.

(*SNYDER, JUDGE, Absent.)

1. The plea of usury is a defense personal to the debtor, therefore in his lifetime his creditor can not plead it to defeat the claim of another creditor in whole or in part. (p. 114.)
2. Where a creditor is secured by a second deed of trust on the same property, he has but the equity of redemption and cannot plead usury against a creditor secured under the first trust-deed. (p. 114.)

Appeal from and *supersedens* to a decree of the circuit court of the county of Greenbrier, rendered on the 2d day of June, 1880, in a cause in said court then pending, wherein L. H. Lee & Bro. were plaintiffs, and John A. Feamster and others were defendants, allowed upon the petition of D. J. Ford & Son and James Withrow.

Hon. Homer A. Holt, judge of the eighth judicial circuit, rendered the decree appealed from.

The facts of the case are fully stated in the opinion of the Court.

Samuel Price and John W. Harris for appellants cited the following authorities: 10 Wheat. 362; 4 Pet. 205; 5 Leigh 65, 478; 20 Iowa 678; 47 Barb. 618; 32 Miss. 142; 15 Abb. Pr. N. S. 24; *Nat. B'k v. Com. Warehouse Co.* 49 N. Y. S. C.; 33 N. Y. 317; 14 Johns. 435; 35 N. H. 421; 3 Phil. (Pa.) 213; 14 Abb. Pr. 241; 9 W. Va. 296; 14 W. Va. 367; 2 Leigh 84.

A. C. Snyder and Alexander F. Mathews for appellees cited the following authorities: 4 Pet. 205; 32 Miss. 142; 35 N. H. 421; 14 Abb. Pr. 241; 9 W. Va. 296; *Woodyard v. Polesley*, 14 W. Va.; 14 W. Va. 386; 10 Wheat. 367; 5 Leigh 65, 478; 42 Wisc. 631; Tyler on Usury ch. 31 p. 417;

*Cause submitted before Judge S. took his seat on the bench.

46 Wisc. 792; 7 Conn. 409; 3 Ala. 458; 36 Ala. 168; 32 Conn. 550; 8 Ind. 352; 11 Ind. 398; 21 Ia. 36; 4 Dana. 177; 13 Mass. 515; 15 Mass. 96, 103; 1 Mich. 84; 14 N. J. Eq. 56; 37 N. Y. 218; 30 N. Y. 197; 33 N. Y. 31; 1 Barb. 271; Code p. 475, § 10; Sto. Eq. Pl. §§ 389, 398, 401; 3 Dan. Ch. Pl. & Pr. pp. 1742-3-4, 1747; 14 W. Va. 637; Code ch. 134, p. 637 § 5.

JOHNSON, PRESIDENT, announced the opinion of the Court:

This is a suit in equity brought in the circuit court of Greenbrier county in March, 1878, to subject the lands of the defendant, John A. Feamster, to the payment of the liens thereon. The plaintiff and a number of the defendants were judgment-creditors, while the debts of a number of the defendants were secured by deeds of trust, of which Feamster, as appears by the bill and exhibits, had executed two; one on the 27th day of September, 1877, to A. F. Mathews trustee, to secure Wm. R. Snyder the payment of a bond executed by said Feamster to Snyder for seventeen thousand six hundred and ninety-seven dollars and sixty-six cents, and to indemnify said Snyder as the endorser on Feamster's note payable at the bank of Lewisburg, for seven thousand seven hundred and ninety-two dollars and thirty cents. This deed was admitted to record on the day of its date. The other deed conveying the same property, was executed by said Feamster on the 27th day of November, 1877, to Preston and Spotts trustees, to secure James Withrow, as endorser on notes of said Feamster to a large amount; also to secure other debts therein named, and on the day of its date it was admitted to record.

The cause was referred to a commissioner, and the amount of the liens and their priorities fixed. After the lands had been sold under a decree of the court, and report of sale unexcepted to had been confirmed, the defendant James Withrow, who had not before answered, filed his answer and cross bill, the main object of which was to attack the debt from Feamster to W. R. Snyder as usurious, and to have it purged of its usury; and prays that the decree rendered in the cause at the May term 1878, may be reheard and reviewed, and the debt therein decreed to Snyder be purged of its usury, &c.

William R. Snyder, by counsel, appeared to this bill and insisted, that James Withrow, could not attack the debt from Feamster to Snyder, on the ground of usury; that the plea of usury was personal to the debtor, and could not be pleaded by a stranger; that the most he received by the deed of trust to secure him was the equity of redemption, and he could not therefore plead usury to the said debt.

D. J. Ford & Son, judgment creditors of said John A. Feamster, also filed their petition setting up, that there was usury in the said debt from Feamster to Snyder and praying, that it be purged of said usury. The court decided, that the said petitioners and the said plaintiff in the cross bill, could not plead usury to the said debt of Feamster to Snyder, and dismissed both the petition and cross bill. By a deposition it appeared, that John A. Feamster, had paid Snyder one hundred dollars, for which he had no credit; but as the record shows, on the 21st day of July, 1880, W. R. Snyder in the clerk's office of the circuit court of Greenbrier county, released the amount of the said one hundred dollars, and interest, from the amount that had been decreed to him against the said Feamster.

From the said decree dismissing the said bill and petition, the said Withrow and said Ford and Son appealed, and assigned for error, "that the court ought to have given a decree for the one hundred dollars, Snyder owed Feamster, and second, that the court ought to have purged the debt from Feamster to Snyder of its usury;" and charge, that the usury was clearly proven by the depositions taken in the cause. The release having been given of the one hundred dollars, before the appeal was allowed, takes that question from our consideration. It is argued, that it does not do so, as the release was not in favor of any one, but was general. It certainly had the effect of placing one hundred dollars just where it ought to go. Snyder had the first lien. On that lien one hundred dollars had been paid by Feamster the debtor, and ought to have been credited. By the release he does credit it; his debt, which must be paid out of the proceeds of the land is one hundred dollars less, and the next creditor has his increased by one hundred dollars. It is insisted, that this Court by the decisions of *Feamster v. Withrow*, 9 W.

Va. 296, and *Woodyard v. Polsley*, 14 W. Va. 211, have decided principles, which would prevent a subsequent lienor from attacking the first lien on the ground of usury. We think no such principle was decided in either case. There are many reasons, not personal to the debtor, for which creditors might contest the claims of each other. In *Woodyard v. Polsley*, *supra* we held, that after a man was dead, and his estate was being distributed among his creditors in a court of equity, a creditor might rely on the statute of limitations to defeat the claim of another creditor. But this was put upon the principle, that it was then impossible for the debtor to plead the statute of limitations; his voice was hushed; the law made it the duty of his personal representative to plead the statute of limitations, and if the personal representative did not do it, the creditors might do so as against each other.

With a living man it is altogether different. The law does not compel him to plead the statute of limitations; it is a personal privilege that he can avail himself of or not, as he pleases. It might be greatly to his injury in his future business transactions to plead it, and therefore he might not choose to do so, and it would be hard on him, while living with business hopes and prospects in view, to permit another to force him into such an unenviable position. The same might be said as to the plea of usury.

Let us see what the authorities have said about the character of the plea of usury; whether it is personal to the debtor, or whether another, who may be benefited by it, may plead it without the debtor's consent.

In *Lyon v. Welsh*, 20 Ia. 578, it was held, that in an action to foreclose a mortgage upon the homestead, executed by the husband and wife to secure a note executed by the husband alone, the wife may set up a plea of usury against the note. Judge Wright, who delivered the opinion of the court, says: "The question is, whether the wife, who joined in the mortgage, but did not sign the note, can be permitted to plead usury. The mortgage was in part upon the homestead of the defendants, and without determining whether it was also upon other lands, she could be heard to make this defense; we unite in the opinion that her interest in the

homestead clearly gives her the right." In *Cole v. Bansemer*, 26 Ind. 94, it was held, that a junior incumbrancer where the debtor is insolvent, may set up the defense of usury to a prior incumbrance, without the consent of the debtor, for the purpose of protecting the fund, out of which the liens are to be satisfied. In his opinion Frazer J. admits the former decisions in Indiana were the other way; he says, "In this State at one time the older doctrine seemed to be settled as our law, and if it had not subsequently been thrown in doubt, we should now, probably, without re-examination, feel bound to adhere to it as a rule of property, upon the faith of which the public have based their business transaction." See also *McAlister v. Jerman*, 32 Miss. 142.

In *The Mutual Life Insurance Co. of N. Y. v. Bowen*, 47 Barb. 618, it was held, that "in a proceeding for the distribution of surplus money arising from the sale of mortgaged premises under a decree for the foreclosure of the first mortgage, the holders of a fourth mortgage may set up before the referee usury in a third mortgage." None but New York authorities are cited in the case.

In the case of *Merchants' Ex. N. Bank v. Com. Warehouse Co.*, 49 N. Y. 642, Folger, Judge, refers to a review of the New York authorities on this subject by Jones, J., whose conclusions are as follows: "First—All privies to the borrower, whether in blood, representative or estate, may both in law and equity by the appropriate legal and equitable remedies and defences attack or defend against a contract or security, given by the borrower which is tainted with usury, on the ground of such usury, where such contract or security affects the estate derived by them from the borrower. Second—That a grantee or assignee of a borrower, who does not take his grant or assignment subject to a lien on the property granted or assigned, created by the borrower, which is tainted with usury, is privy in estate with the borrower, as to the entire interests in the property, described in the assignment or grant, as deriving from such borrower such entire interests, and, as such privy may attack, or defend against such lien, under the first rule. Third—But if a grantee, or assignee takes his assignment or grant from the borrower, subject to a lien on the property tainted with usury, then as

to so much of the property which is necessary to satisfy such lien, he is not in privity in estate with the borrower, for so much of the property as is not assigned or granted to him, and therefore he does not as to such lien come within the first rule. Fourth—A borrower may himself pay an usurious debt; and if he does neither himself nor any other person, can attack such payment on the ground of the usurious character. He may also, therefore, appropriate property for its payment, and make such appropriation, by assigning the property in trust for the payment of the usurious debt; and if he does, neither the assignee nor any other person can (unless he attack the assignment for fraud) claim that property so appropriated shall not be applied to the payment of the usurious debt. The bare fact that such an assignment prescribes for the payment of an usurious debt will not of itself alone, render the assignment usurious and void. Fifth—That one who does not claim through and under the borrower, does not stand in privity with the borrower, and does not come within the first rule.”

In *Ladd v. Wiggin*, 35 N. H. 421, it was held, that “the defense of usury is personal; and as against a subsequent purchaser, only the amount of the illegal interest is to be deducted from the amount due upon a mortgage.”

In *Crenshaw Adm'r v. Clark et al.*, 5 Leigh 68, Carr, J., said: “If the injured party chooses to waive the matter (the usury) what right has a subsequent voluntary purchaser with full notice of the lien to take advantage of it.” Judge Tucker, page 70, said: “If the party who is the victim of the fraud or usury, waives his remedy and relieves his adversary, it does not belong to a subsequent purchaser under him to recall and resume the remedy for him.” In this case, the junior purchaser was not the purchaser of the equity of redemption, but of the mortgaged premises generally.

In *Spengler v. Snapp*, 5 Leigh 478, the court citing and approving *De Wolf v. Johnson*, 10 Wheat. 367, held, that “the plea of usury is a defense personal to the debtor, and so the purchaser of land subject to a previous lien, cannot object that the lien is usurious, but is bound to discharge the lien as a part of the price of the land.”

The great weight of authority conclusively shows, that the

policy of the Legislature in adopting statutes of usury was the protection of borrowers, against the oppressive exactions of lenders; and it does not tend to the promotion of that policy, that other persons than the victims of the usury, or persons standing in legal privity with them, should have the benefit of such statutes; and therefore it has been the general current of decisions, that the plea of usury is a defense personal to the borrower, and a stranger cannot avail himself of it. *Beenley v. Homier*, 42 Wis. 631; *Ready v. Huebner*, 46 Wis. 692; *Dolman v. Cook*, 14 N. J. Eq. 56; *Ohio and Mississippi R. R. Co. v. Kasson*, 37 N. Y. 218; *Bullard v. Raynor*, 30 N. Y. 197; *The Mechanics Bank v. Edwards*, 1 Barb. 271; *Farmers and Mechanics Bank v. Kimmel*, 1 Mich. 84; *Campbell v. Johnson et al.*, 4 Dana 178; *Green v. Kemp*, 13 Mass. 515; *Huston v. Stringham*, 21 Ia. 36; *Wright v. Bundy*, 11 Ind. 398; *Stevens v. Muir*, 8 Ind. 352; *Reading v. Weston*, 7 Conn. 409; *Fenno v. Sayre*, 3 Ala. N. S. 458; *Loomis v. Eaton*, 32 Conn. 550.

From these authorities it is clear, that the plea of usury is a defense personal to the debtor, and therefore in his lifetime, his creditor cannot plead it, to defeat the claim of another creditor, either in whole or in part. And where a creditor is secured by a second deed of trust on the same property, he has but the equity of redemption, and cannot plead usury against a creditor secured under the first trust deed. See *Tate v. Liggatt & Muthews*, 2 Leigh 84.

As the foregoing authorities afford ample reason for dismissing the cross bill of Withrow, and the petition of Ford & Son, we have thought it unnecessary to inquire whether if the defense was proper for them to make, it was made in time. For the foregoing reasons, the decree of the circuit court of Greenbrier county, dismissing said cross-bill and petition, is affirmed with costs and thirty dollars damages.

THE OTHER JUDGES CONCURRED.

DECREE AFFIRMED.

WHEELING.

GILCHRIST v. W. VA. O. & O. L. Co.

Submitted June 18, 1878—Decided December 2, 1882.

(*SNYDER, JUDGE, Absent.)

21	115
36	126

21	115
38	308

21	115
45	746

21	115
e62	463

1. In deciding what effect a judgment rendered in another State is to have in this, it must be regarded as well settled, that it must have the same faith and credit here, as it had in the State where it was rendered. (p. 118.)
2. When a judgment rendered in another State is sought to be enforced in a court in our State, our courts may enquire into the jurisdiction of the court which rendered it, and if it appear that the court which rendered the judgment had not jurisdiction, the judgment is void; but if otherwise, it is valid and binding in our State. (p. 118.)
3. If the court, which rendered the judgment, was a court of general jurisdiction, the presumption is it had jurisdiction of the particular case, and to render the judgment void, this presumption must be overcome by proof. (p. 118.)
4. Where the validity of the judgment depends upon a construction of the statutes of the State, in which the foreign court rendered the judgment, our courts will adopt the construction put upon the said statutes by the courts of the State which enacted them. (p. 119.)
5. By the construction, which the New York courts put upon the New York statutes authorizing proceedings against foreign corporations, no judgment *in personam* can be rendered in that State against a foreign corporation, unless it has appeared to the action. (p. 123.)

Appeal from and *supersedeas* to a decree of the circuit court of the county of Wood, rendered on the 9th day of October, 1877, in a cause in said court then pending, wherein R. W. Gilchrist was plaintiff, and the West Virginia Oil and Oil Land Company was defendant, allowed upon the petition of said defendant.

Hon. James M. Jackson, judge of the fifth judicial circuit, rendered the decree appealed from.

*Cause submitted before Judge S. took his seat on the bench.

The facts of the case are fully stated in the opinion of the Court.

Arthur I. Boreman for appellant cited the following authorities: Code pp. 90–91, § 4; Voorhies N. Y. Code (ed. 1870) § 134; 5 How. (N. Y.) 183; 9 How. (N. Y.) 448; Voorhies Code § 427; 8 Abb. 284; 2 Hilt. 262; 30 Barb. 159; 20 How. (N. Y.) 62; 18 How. (N. Y.) 412; Sto. Prom. Notes, § 339; Dan. Neg. Inst. p. 680, § 898; 4 Abb. 77; 13 How. (N. Y.) 516; 16 Abb. 249; 18 How. (U. S.) 404; 10 Pet. 449; 9 Leigh 119; 9 Gratt. 323; 27 Gratt. 624; 18 Wall. 457; 19 Wall. 59.

Cole & Cole for appellee cited the following authorities: *Mills v. Duryee*, Cranch 481; 5 Wall. 291; 22 Wall. 77; 18 Wall. 457; 1 Smith L. Cas. (pt. 2) 1124; Big. on Estop. 234; 17 Wend. 473; 9 Leigh 119; 9 Gratt. 328; *Hall v. Hall*, 11 W. Va.; 2 How. (U. S.) 319; 19 Wall. 58; Code ch. 13 § 4; 2 Wisc. 523; Voorhies (N. Y.) Code, (ed. 1870) §§ 134, 138; Am. L. Reg. Aug., 1877, p. 504; 1 Neb. 14; 9 How. Pr. 448; 41 Barb. 10; 26 How. 225; 18 How. 404; 2 Wood C. C. 479.

JOHNSON, PRESIDENT, announced the opinion of the Court:

In April, 1876, the plaintiff filed his bill in the circuit court of Wood county, in which he alleged the recovery of a judgment on the 7th day of June, 1875, in the supreme court of New York against the defendants, a corporation organized and existing under and by virtue of the laws of Michigan; and also against James H. Carrington and Henry Carrington, partners under the firm name of J. H. Carrington & Co., for the sum of one thousand five hundred and forty-nine dollars and seventy cents. The bill exhibits the said judgment and alleges, that it has not been satisfied in whole or in part; that the defendant company has property in said county of Wood, also in Ritchie county; that several parties named in the bill have property in their possession belonging to said company; that the West Virginia Transportation Company is indebted to said company, and said parties had been summoned as garnishees; that plaintiff is a

lessee of said company, and has caused himself to be summoned as garnishee, and had caused an attachment to be levied on the oil in his possession; that an order of attachment had issued in the case, and a considerable amount of property in the hands of different parties, had been levied on thereunder.

The bill charges, that the defendant company is insolvent, and has no property to pay said judgment other than that levied on under the attachment in the cause. It makes all the parties having property in these processes, which was attached in the cause and those summoned as garnishees defendants, and prays a decree against the defendant company and Jas. H. Carrington & Co., for the amount of the judgment and costs, and that the attached property be sold to pay the same, &c.

The defendant company demurred to the bill and also answered, in which answer it denied the validity of such record and judgment exhibited with the bill, because as it claims, under the laws of New York the said New York court had not jurisdiction to render such personal judgment as was rendered. First, because the said defendant company was a corporation foreign to New York and to the jurisdiction of said court, and the service of the summons and complaint in said cause, purports to have been on said company, on the 2d day of April, 1874, by delivering a copy thereof to Jas. H. Carrington as the managing agent of said company; but it is not stated at what place the service took place, or whether or not it was within the said city, county or State of New York. It denies, that according to the laws of New York it was served with process in the said cause in New York in which said judgment was rendered; and that James H. Carrington, to whom it appears by said pretended record, and affidavit of Wilson Hogg, that copies of the summons and complaint in said suit were delivered on the 2d day of April, 1874, was not at that time an officer of defendant, or its managing agent, nor was he at that time the agent at all of defendant, nor did he at that time sustain any relation to defendant, which authorized, service on defendant by delivering copies of summons and copies of petition to said Carrington, &c.

To the answer the plaintiff replied generally: Proof was taken as to the agency of Carrington, the service of process on the agent, &c.; and on the 13th day of April, 1877, the court rendered a decree, holding said personal judgment rendered in New York valid, and decreed the payment thereof, &c. From this decree an appeal with *supersedeas* was granted.

The question here to be decided is, was the New York court authorized to render a personal judgment against the West Virginia Oil and Oil Land Company. It must be remembered, that the said company is a foreign corporation, confessedly so in the record, and there is no pretense, that by the laws of New York, it was *quo ad* any business it did in that State, regarded and held to be a domestic corporation.

In deciding what effect the judgment rendered in New York is to have in our State, it must be regarded as well settled, that the judgment of a State court is to have the same faith and credit in each and every State in the Union, as it had in the State where it was rendered. *Mills v. Duryee*, 7 Cranch 481; *Christmas v. Russell*, 5 Wall. 291; *Maxwell v. Stewart*, 22 Wall. 77.

When a judgment rendered in another State, is sought to be enforced in our State, our courts may enquire into the jurisdiction of the court which rendered it, and if it appear that the court which rendered the judgment had not jurisdiction, it is void; but if it had jurisdiction then it is valid and binding in our State. *Thompson v. Whitman*, 18 Wall. 457, and cases cited.

If the court be one of general jurisdiction the presumption is, that it had jurisdiction of the particular case, and to render the judgment void, this presumption must be overcome by proof. *Grignon's Lessee v. Astor*, 2 How. U. S. 319; *Knowles v. Gas Light Co.*, 19 Wall. 58.

If we concede, that the cause of action upon which the judgment was rendered arose in the State of New York, and the defendant had property there, and under the forms of the laws of New York process was served upon a properly constituted agent of the foreign corporation, still the question recurs, could the court legally render a personal judgment against the foreign corporation, when it had not ap-

peared generally to the action. We may concede, that the court did have jurisdiction to subject the defendants' property by attachment, to the payment of its debt in New York, but could it go further and without the appearance of the corporation to the action, render a *personal* judgment against it?

After the judgment had been recovered in the action mentioned in the record of the New York court, the defendant by counsel, did appear, and moved to vacate the judgment on the ground, that the court had not jurisdiction to render it. And by the decision of Judge Lawrence, filed here it appears, that he refused to vacate the judgment, because as he held, the cause of action arose in New York, and therefore the court had jurisdiction.

The statutes under which the proceedings were had, are sections 427, and 134, of Voorhees' New York Code. Section 427 provides, "An action against a corporation created by or under the laws of any other State, government or country, may be brought in the supreme court, the supreme court of the city of New York, or the court of common pleas for the city and county of New York, in the following cases, viz: First, By a resident of the State for any cause of action. Second, By a plaintiff not a resident of this State, when the cause of action shall have arisen, or the subject of the action shall be situated, within this State." And section 134 provides, that the summons shall be served by delivering a copy thereof as follows: "If the suit be against a corporation, to the president, or other head of the corporation, secretary, cashier, treasurer, a director, or managing agent thereof; but such service can be made in respect to a foreign corporation, only where it has property within this State, or the cause of action arose therein, or when such service shall be made within this State personally upon the president, treasurer, or secretary thereof."

This language is very broad, but we must give it just such effect, as the courts of New York have given it, and none other. If a construction had been placed upon it by the said courts we would adopt it, though it was directly the reverse of a construction we had given to similar language, in our own Code. Because the question is, was the judgment

legally rendered in New York? And that legality in this case, depends upon the construction the New York courts have placed upon the statutes we have cited.

In *Hurlbert v. The Hope Mutual Ins. Co.*, 4 How. Pr. 274, Sill, Justice, said: "I find that a notion prevails to a very considerable extent, that it was designed by the amended Code to authorize courts to pronounce judgment *in personam* against a foreign corporation, upon proof of the service of a summons in the manner prescribed by that act. A glance at the former and present practice will show, that it is not very extraordinary that such an impression should exist. At common law, before a judgment could be pronounced, the defendant must be in court either upon its process or by voluntary submission to its jurisdiction; and a statement that a defendant was in court was an indispensable requisite in the record of every valid judgment. * * * The amendments to the Code followed which provide, that actions may be brought in the supreme court against foreign corporations, upon contracts made in this State and by plaintiffs, who are residents of this State (§ 427); and that suits in a court of record shall be commenced by the service of a summons, &c." The judge further proceeds to say, in speaking of the effects of the New York statutes as to suits against foreign corporations on page 275, that the summons "was a step preliminary to a proceeding against the defendants' property in this State; a step ineffectual for any purpose unless followed by a warrant of attachment and seizure of property. The summons is not in such a case a judicial process; nor is its issue and service in fact (what it is with doubtful propriety called in the Code) the commencement of an action against a *foreign corporation*; but, for all practical purposes is simply a statutory notice, that proceedings are about to be instituted against its *property*."

In this case it clearly appeared, that the cause of action arose in New York.

In *Brewster v. The Michigan Central R. R. Co.*, 5 How. Pr. 187, Wills, Justice, said: "The defendant is a corporation created by the laws of the State of Michigan. The judgment entered is a general one, in the nature of a judgment *in personam* against the defendant, and the execution is issued

against the property of the defendant generally. Under it the sheriff is bound to take any property of the defendant, real or personal, which he can find in his bailiwick, sufficient to make the amount. No attachment has been issued and there has been no voluntary appearance of the defendant in the action."

In *Hurlbert v. The Hope Mutual Ins. Co.*, 4 How. Pr. R. 275, Mr. Justice Gill, has shown in a very able and clear opinion, that in such a case the courts of this State cannot obtain jurisdiction of the defendant, so as to render a personal judgment. The extent of process of the court over a foreign corporation, where there has not been a voluntary appearance in the action, is to subject the property and effects of such corporation within this State, to the payment of its debts by a judgment *in rem* as to such property and effects after the same has been attached, before the judgment is rendered according the direction of chapter 4 of title 7 of the Code. The service of summons with all subsequent proceedings on the part of plaintiff, including the judgment and execution must be set aside."

One point of the syllabus, in *President, &c., of Bank of Commerce v. The Rutland and Washington R. R. Co.*, 10 How. Pr. 1, is "It seems a judgment against a foreign corporation, in a suit properly brought under the Code is of the same validity and effect as a judgment against any non-resident, obtained without personal service or appearance." In *Schwinger v. Hickok, et al.*, 53 N. Y. 280 it is held, that "the authority given by the Code (§ 135) to proceed by publication against a non-resident when he has property in the State, or the suit has relation to property therein in which he has, or claims an interest, is to be interpreted in view of the necessity which called for its enactment, and authorizes only a judgment *in rem*, not *in personam*."

In the case of *Bates v. The New Orleans, Jackson and Great Northern Railroad Co.*, 13 How. Pr. 519, after quoting the provisions of section 427, Wills, Justice, said, "Any judgment which the plaintiff may or might obtain, will be of no value to him in case the defendants should not appear to the action and submit to the jurisdiction of the court unless, he has attached, or shall be able to attach, property of the defend-

ants in this State before judgment. Such judgment would be *in rem* and not as we think *in personam*. The law has not been changed in regard to the character or effect of a judgment against a foreign corporation, since the decision of the case of *Hurlbert v. The Hope Mutual Ins. Co.*, 4 How. Pr. R. 275, the doctrine of which we approve."

In *Whitehead v. The Buffalo and Lake Huron R'y Co.*, 18 How. Pr. 232, Greene P. J., Marion, Grover and Davis Justices concurring, said, "That the courts of this State have no common law jurisdiction over, or power to render judgments *in personam* against foreign corporations is clear, both upon principle and authority. (See the cases above cited and *Brewster v. The Michigan Central Railroad Co.*, 5 How. Pr. 183.) The proceeding against a foreign corporation, though termed an 'action' against it, is merely a proceeding *in rem*, or a *quasi* proceeding *in rem*, the object and sole effect of which are to appropriate its property within the jurisdiction of the court, to the payment of the debts of the corporation." In *Ogdenburg & C. R. R. Co. v. Vansant & C. R. R. Co.*, 16 Abbott, Pr. 249, it is held, that in an action by a resident of New York, against a foreign corporation, the court cannot acquire jurisdiction of its *person* or legally render a *personal* judgment against it, unless the corporation elects voluntarily to appear.

It seems to me that the question is set at rest in *McCormick v. Penn. Cent. R. R. Co.* 49 N. Y. 303, where it was held, that "where the court has jurisdiction of the subject matter of the action, consent will confer jurisdiction of the person, and in case of a foreign corporation, such consent may be expressed by appearing by attorney and answering generally in the action." In this case *Jones v. Norwich and N. Y. Transportation Co., v. The Penn. Central R. R. Co.*, 50 Barb. 193, the only authority in New York, that seems to be at variance with the general current of authority in the State upon the subject, is criticised and limited. Judge Folger, in delivering the opinion of the court in *McCormick v. Penn. Cent. R. R. Co.*, *supra*, at page 309, after using the language we have already quoted from the syllabus said, "though it seems to have been thought that a foreign corporation could not at common law have been sued here, it was at the same

time suggested, that it would be competent for it to constitute an attorney to appear and plead in action. (*In re McQueen v. The Middletown Manuf. Co.*, 16 Johns. 5.) Since that time it has been so often held, that a voluntary appearance confers jurisdiction of the person, and the rule seems so reasonable in itself, that we have no hesitation in adopting it."

It is clear then, by the construction the New York court has given of its own statutes in regard to proceedings against foreign corporations, that in no case can a judgment be rendered, *in personam* in that State against a foreign corporation; unless the corporation voluntarily appeared to the action. Therefore we are compelled to hold, that the personal judgment rendered in favor of Gilchrist against the West Virginia Oil and Oil Land Company which is set out in the record of this cause was illegally rendered; the said defendant not having appeared to the action, and is null and void. The only claim set up against the said defendant in this suit is the said judgment, but the record of the New York court shows, that it was recovered upon a certain bill of exchange drawn by said defendant on J. H. Carrington & Co. We are not prepared to say, that under the circumstances of this cause the bill ought to be dismissed as asked by the counsel for appellant, but think the plaintiff ought to have leave to amend his bill.

The decree of the circuit court of Wood county rendered in this cause on the 13th day of April, 1877, is reversed with costs to the appellant, to be paid by the appellee R. W. Gilchrist; and this cause is remanded with leave to the plaintiff to amend his bill within a reasonable time, if he elects so to do, and in default thereof, the circuit court will dismiss the same with costs, and to be further proceeded in according to the principles herein set forth, and further according to equity.

JUDGES HAYMOND AND GREEN CONCURRED.

DECREE REVERSED. CAUSE REMANDED.

WHEELING.

DONAHUE *et al.* v. FACKLER *et al.*

Submitted June 23, 1882—Decided December 9, 1882.

1. Commissioners are appointed to make sale of land under a decree of court, requiring them to give bond before proceeding to act. The sale is directed to be made for part cash and the residue on credit, and the sale is made as directed, the cash payment made to the commissioners and bonds executed by the purchaser to the commissioners for the deferred payments. The commissioners fail to give bond as required, and before the sale is reported by them or any order made for the collection of the sale bonds, the purchaser pays said bonds to the commissioners, who were also the counsel who had instituted and prosecuted the suit for the owners of the land sold and among whom the proceeds were to be distributed, but the purchase-money was never paid over to said distributees. **HELD:**
 - I. The said persons appointed commissioners had no authority to receive said purchase-money, either as commissioners or as counsel for the parties, and the purchaser is bound to pay it again. (p. 129.)
 - II. The commissioners, having received the money without authority, are liable in this suit to the purchaser for the amount so paid them, or either of them, with interest thereon from the time it was paid to them. (p. 132.)
2. When it is uncertain whether or not certain persons have an interest in land, it is error to decree a sale of such land without making such persons parties to the suit. (p. 133.)

Appeal from and *supersedeas* to a decree of the circuit court of the county of Putnam, rendered on the 7th day of November, 1879, in a chancery cause in said court then pending, wherein Thomas M. Donahue and others were plaintiffs, and and Wiley Fackler and others were defendants, allowed upon the petition of Francis J. Gray.

Hon. Joseph Smith, judge of the seventh judicial circuit, rendered the decree appealed from.

SNYDER, JUDGE, furnishes the following statement of the case:

Thomas M. Dunahue and others instituted this suit in the circuit court of Putnum county in August, 1858. In its inception it was a friendly suit to sell certain lands lying in said county belonging jointly to the plaintiffs and defendants and which, it was alleged and proven, could not be partitioned in kind with advantage to the owners. The cause was matured for hearing and a decree entered appointing commissioners to make sale of said lands. The said commissioners, pursuant to said decree, made sale thereof on September 10, 1859, to James M. Gray, and by a decree of December 15, 1869, said sale was confirmed. From said decree and a subsequent decree of October 24, 1873, the said James M. Gray appealed to this Court. A sufficient statement of the nature and object of the suit and the proceedings had therein prior to and on the 25th day of February, 1875, the date on which the decision of this Court was pronounced upon the former appeal, may be found in the opinion of Paul, Judge, reported in 8 W. Va. 249

After the cause had been remanded by this Court, the plaintiffs filed in the circuit court of Putnum county an amended bill in which, after giving a synopsis of the proceedings theretofore had therein, they aver that Andrew Parks and James W. Hoge as special commissioners had surrendered to the defendant James M. Gray all three of the bonds for deferred payments on the lands sold by them, and that on the first of said bonds are these words endorsed:

“By \$325 paid Thomas Donahue, 10th September, 1859.

“PARKS & HOGE.”

“Paid to Parks & Hoge and Donahoe & Austin.

“JAMES W. HOGE.”

The second of said bonds is endorsed: “Received payment. Parks and Hoge.” And that the third contains an endorsement in the same words as the second and with the same signatures.

They, also, allege that no part of said purchase-money was paid in such manner as to constitute a payment by the said Gray; that a large portion was paid in Confederate money and in bacon, lard, &c., to the said Parks and Hoge commissioners, without the knowledge or consent of any of the beneficiaries of the fund, either plaintiffs or defendants; that

said bonds were surrendered before said sale was confirmed; that said commissioners were never authorized to collect said bonds, nor had they as such commissioners ever executed any bond as required by the decree of sale; that said Andrew Parks has departed this life and John W. Sentz has been appointed his administrator; and that James W. Hoge the surviving commissioner declines to act further in the premises. They make the defendants to their original bill, John W. Sentz administrator of Andrew Parks, deceased, and James M. Gray defendants, and pray, that said James M. Gray may be compelled to account for and pay the whole of said purchase-money with its accrued interest; that said James W. Hoge may be required to disclose fully what consideration was given to him and his co-commissioner Parks for the surrender of said sale bonds, what portion was lawful money, and if it be ascertained that any portion of said purchase-money has been paid by said James M. Gray to said commissioners in such manner as to constitute a credit upon said bonds, that they or either of them be required to account for same; and for general relief.

The defendant James M. Gray, having departed this life, Frances J. Gray, his widow and administratrix, and his children and heirs at law were made defendants; and by an order, entered October 25, 1876, it is shown that the administratrix and heirs demurred to the plaintiffs' said amended bill which demurrer the court overruled. On the 28th day of April, 1877, the said administratrix and heirs of James M. Gray, deceased, filed their answer to said bill in which they aver, that all the purchase-money for the said land was paid by said James M. Gray in a valid manner to parties authorized to receive the same and in such a way as to discharge the said Gray and his estate from all liability, and to entitle his heirs to a deed for said land from the court; that no part of said money was paid in Confederate currency or anything else except lawful money; that said Andrew Parks and James W. Hoge, the commissioners appointed to sell said land, were also partners in the practice of the law under the firm name of Parks & Hoge, and were as such partners the attorneys of the plaintiffs and all the other original parties to this suit and all of the persons who had any interest in the

said land at the time of the sale thereof and until the same was paid for by said Gray, and as such attorneys they prosecuted this suit, made said sale and collected the purchase-money therefor; that the said Gray paid said purchase-money in full for said land, partly to the parties to whom the same was coming and the residue to said Parks and Hoge as commissioners or as attorneys for the parties entitled to receive it. And they exhibit with their answer two orders—the one signed by the plaintiff, Thomas M. Donahue, acknowledging the payment to him, on September 10, 1859, of three hundred and twenty-five dollars by James M. Gray and directing said commissioners, Parks and Hoge, to credit said amount on the bonds given by said Gray for the land sold by said commissioners, and the other signed by P. S. Austin acknowledging the payment of one hundred and ninety-seven dollars and fifty-three cents on May 3, 1860, by Gray to him upon his interest in said purchase-money and directing said commissioners to credit said Gray's bonds for said sum.

James W. Hoge in his answer admits the institution of the suit, the sale of the land and proceedings had in the cause as stated in the plaintiffs' bills; that he was the junior commissioner and almost the entire business was transacted by his co-commissioner, Parks; that he cannot explain why a report of the sale had not been made to court and he always believed such report had been made until recently; that whatever payments were made by Gray, on the sale of lands, to him and his co-commissioner were made separately and none of them were joint payments; that the first sale bond was paid as follows: To Thomas M. Donahue, on September 10, 1859, three hundred and twenty-five dollars; to P. S. Austin, on May 3, 1860, one hundred and ninety-seven dollars and fifty-three cents, to respondent, on September 15, 1860, one thousand three hundred and seventy-two dollars, and to Andrew Parks two hundred and ninety-seven dollars; that the second and third bonds, if they have been fully paid, were paid to said Andrew Parks alone, and that no part thereof was ever received or used by respondent; that the endorsements of said two last bonds is in the handwriting of said Parks, and respondent refused to receive, or be a party to, any payment of the said two bonds; that he

cheerfully admits his liability for the one thousand three hundred and seventy-two dollars paid to him as aforesaid, but denies that he is liable for any other sum.

On the 28th day of April, 1877, the cause was referred to a commissioner who made and returned a report which was, on the 7th day of November, 1879, confirmed without exception; and the court by its decree of said date, after reciting, "that said James M. Gray, having paid said purchase-money to the said Andrew Parks and James W. Hoge when they were not authorized to receive more than the cash payment of three hundred dollars, he was bound to see to its proper application, and if not properly applied said Gray and his representatives must look to said Parks and Hoge, respectively, for reimbursement of the amounts paid by him to each of them, respectively, the liability of said Parks and Hoge, as special commissioners, to the estate of said James M. Gray being separate and not joint," it orders and decrees that unless the administratrix of the estate of James M. Gray, deceased, pay to commissioners named therein, within sixty days, "the sum of the said three bonds executed by said James M. Gray to Austin Parks and James W. Hoge special commissioners, for two thousand and eighty-nine dollars and twenty cents each, with legal interest thereon from the 10th day of September, 1859, less the said sum of three hundred and twenty-five dollars paid to Thomas M. Donahue by said Gray on the 10th day of September, 1859, and less the sum of one hundred and ninety-seven dollars and fifty-three and two-third cents, paid by said Gray to P. S. Austin on the 3d day of May, 1860, and less the interest on said last two named amounts from and after the respective days of their payment," that then said commissioners are directed to resell the said tract of land sold by commissioners Parks and Hoge to said Gray, in the manner and upon the terms stated in said decree. The said commissioners are required to give bond in the penalty of ten thousand dollars. The said decree, also, directs and orders, that James W. Hoge do pay to the personal representative of said James M. Gray the said sum of one thousand three hundred and seventy-two dollars which he had in his possession on the 15th day of December, 1869, with interest thereon from that date, with-

in ten days. And the decree concludes as follows: "And it is further ordered that * * * * * nothing in this decree contained is in any manner to preclude or prevent the said administratrix and heirs-at-law of James M. Gray, deceased, from taking such further steps as they may deem necessary in this suit to recover the amounts of money and other things which were paid by said James M. Gray to said Andrew Parks, in taking up said bonds, from the estate of said Andrew Parks, deceased," &c. From this decree the administratrix of said James M. Gray was granted an appeal with *supersedeas* to this Court.

Smith & Knight for appellant cited the following authorities: 8 W. Va. 249; 10 Leigh 317; 13 W. Va. 765; 10 W. Va. 220; 8 W. Va. 388; 1 Call. 127; 31 Ill. 62; 3 W. Va. 167; 44 Ill. 184; 8 Pet. 18; 1 Green (Mc.) 388.

John W. English for appellees cited the following authorities: 75 Va. 116; Acts 1872-3, ch. 51, p. 117, § 4; 26 Gratt. 549; 32 Gratt. 74; 14 W. Va. 387; 18 Wall. 151; 18 Gratt. 82; 1 Bart. Chy. Pr. p. 163; 26 Gratt. 746, 750; 3 W. Va. 232; 27 Gratt. 824.

SNYDER, JUDGE, announced the opinion of the Court:

The essential enquiry in the case is, whether the payments made by James M. Gray to Parks and Hoge are valid payments? The appellant admits that the sale until confirmed was an incomplete contract, a mere offer to purchase, but she claims, and cites authorities which fully sustain the position, that when a judicial sale is confirmed by the court such confirmation relates to and vests the title of the land in the purchaser from the date of the sale—*Taylor v. Cooper*, 10 Leigh 317; *Evans v. Spurgin*, 6 Gratt. 107; *Hyman, Moses & Co. v. Smith*, 13 W. Va. 744, 767. And as a conclusion from this, the appellant insists that, in contemplation of law, any payment made by the purchaser between the day of sale and the day of confirmation, which would have been valid when made, if the sale had been confirmed, is made just as valid by the subsequent confirmation. This conclusion is also sustained by the authorities above cited, but in my view it has

no application to the facts in the case before us. The difficulty here is, that the commissioners who made the sale had no authority to collect the bonds taken for the deferred installments of the purchase-money. Their acts in this regard would have been just as much unauthorized if the sale had been confirmed as they were when it was not confirmed. The said commissioners, it is clearly shown never gave the bond required by the decree. The giving of the bond was a condition precedent to their right to receive any part of said purchase-money. And the purchaser was bound to see that the bond was given and if he paid the purchase-money without such bond having been given the payment was unauthorized and he was still liable for the debt. *Tyler v. Toms*, 75 Va. 116; *Hess v. Rader*, 26 Gratt. 746; *Lloyd v. Ervin*, 29 Gratt. 598.

The said case of *Tyler v. Toms*, is very similar in its facts and character to the one before us and for the reasons assigned in the opinion in that case we are satisfied and decide that the payments made by James M. Gray in this case to Parks and Hoge special commissioners were unauthorized and constituted no discharge of the said Gray's bonds—*Blair, Com'r. v. Core*, 20 W. Va. 265.

It was proven in this cause that Andrew Parks and James W. Hoge were partners in the practice of the law under the firm name of Parks & Hoge, and that as such partners and attorneys they instituted and prosecuted this suit for all the parties interested in the land sold and in the proceeds derived from the sale; and it is, therefore, claimed by the appellant that, inasmuch as the said Parks and Hoge were the attorneys for the parties as well as the commissioners of the court, and having no authority to collect the sale bonds as commissioners, they must be treated as having received payment of said bonds as such attorneys and that they were authorized as such to receive such payment and discharge the debt and the debtor.

The authority of an attorney to receive payment of a debt, which he is employed to recover by suit or collect is well settled, and has been sustained by repeated decisions of this Court—*Wiley v. Mahood*, 10 W. Va. 206; *Yoakum v. Tilden*, 3 W. Va. 167.

In the case at bar, however, it is not shown that Parks and Hoge pretended to receive the payments made to them by Gray as attorneys for the parties, and the circumstances tend very much to show that they did not in fact so receive them. The bonds were executed to them as special commissioners. They were payable to them as agents or officers of the court. The fund was coming to and subject to the order of the court. The parties themselves to whom it might be ultimately payable had no right to demand it except through the orders of the court. The orders given by Thomas M. Donahue and P. S. Austin, both of which, Hoge states he prepared and which were held and filed in this cause by Gray, were evidently drawn upon the theory that neither the parties nor their counsel were authorized to receive payment from Gray. The said orders are directed to said Parks and Hoge and authorize them to credit the amounts therein mentioned and charge the same to the said Donahue and Austin. If it had been believed, then, that either the parties or their counsel were authorized to receive payment from Gray, it is very improbable that these transactions would have taken this circuitous form.

The attorneys would undoubtedly have had authority to receive the portions ascertained to be due their clients from the commissioners of the court, but until there had been an order made ascertaining the portion or sum due their clients neither they nor the clients themselves by receiving the money from the purchaser could have discharged the debtor. In this case the portion coming to the several owners of the land had not been ascertained. The fund belonged to them all jointly, in different proportions and no one of them had a right to any particular part in severalty. If, therefore, the parties had no right to demand or receive payment, *a fortiori*, their counsel could have no such power. It is true, that, if payment had been made to a party and it was subsequently determined by the court, that such party was in fact entitled to a sum equal to that thus paid, the court would not require such party to refund the sum so paid in order that a sum equal to it might be repaid him. But such action does not rest upon the ground that the original payment was authorized, but upon the ground that the payment reached its

proper destination. The debtor by making such unauthorized payment takes upon himself the risk of its ultimately coming to the person entitled thereto. He thereby becomes an insurer and remains responsible for any loss or miscarriage before the fund reaches the person to whom the court ultimately determines it is payable. If the fund is found in such person's hands when the order is made by the court for its distribution, the payment will be ratified by the court and the debtor discharged, otherwise he will still be liable for the debt.

In *Tyler v. Toms*, *supra*, the commissioners were, also, counsel for the parties, yet the court held the payment to them unauthorized and gave a decree against the purchaser for the amount so paid to them, because the money was lost.

The money, or other things, paid to Parks and Hoge by Gray in this case, having been lost, or, at least, failed to reach the persons ultimately ascertained to be entitled to it, the bonds given by Gray for the purchase-money were not discharged by such payment, and the circuit court properly held that the land and said Gray's estate were still liable therefor.

It is, also, claimed that the said circuit court erred in allowing interest on the said sum of one thousand three hundred and seventy-two dollars, directed to be paid by James W. Hoge to J. M. Gray's administrator, only from December 15, 1869, instead of from September 15, 1860. Hoge admits in his answer that Gray paid to him, on December 15, 1860, the said sum and that it was credited on said Gray's first bond for the land sold in this suit as of that date. In the case of *Tyler v. Toms*, *supra*, it was distinctly decided that when a party receives money under color of his office although he was in fact unauthorized to receive it, he cannot escape responsibility by relying upon his illegal exercise of authority. A person who having assumed to himself, but improperly neglects, the duties of commissioner or receiver, whilst the parties interested consider him to be acting as such, makes himself responsible for any loss occurring through his neglect. Kerr on Rec'rs, 211-12.

The said Gray having failed to receive credit for said one thousand three hundred and seventy-two dollars, he is entitled to receive back the same with interest from the date

it was paid to said Hoge. The failure of the circuit court to require the payment of the said sum with such interest was clearly erroneous. The said decree of November 7, 1879, is erroneous in another respect. It decrees against the estate of J. M. Gray the sum of said three bonds executed by Gray to Parks and Hoge as commissioners for two thousand and eighty-nine dollars and twenty cents each, with interest thereon from the 10th day of September, 1859, subject to certain credits therein mentioned. It should have been for the aggregate of principal and interest due at the date of the decree, with interest thereon from that date. Chap. 131 sec. 16 Code p. 627.

It is, also, alleged by the appellant that the said decree is erroneous, because the proper parties were not before the court; that the plaintiff, Thomas M. Donahue, claims as assignee of H. R. Austin, Alexander M. Austin and Washington Austin as devisees of Letitia Austin, deceased, and that the only evidence in support of the claim is certain deeds from said devisees to said Donahue, all of which are dated before the death of said Letitia Austin and before the date of her will. These deeds do not purport to convey any lands derived from said testatrix, but simply convey the interest of the grantors in the estate of Morris Austin, deceased, mentioning therein about seven hundred and fifty acres or land in Kanawha county, adjoining the lands of Henson, Morris and others, as a part of the land belonging to said Morris Austin's estate. One of the said deeds conveys the interest of the grantors therein with covenants of general warranty and the others do not.

It seems to me that these grantors H. R., Alexander M. and Washington Austin, and especially the two latter, who are not bound by any covenant of general warranty, should have been made parties to this suit; because if they have not in fact conveyed their interests in the land purchased by said James M. Gray, then unless they are made parties and become bound by said sale, the said Gray would acquire no title to their interests. And he and his estate having been compelled to pay more than once already for said land, it would seem to be right and proper that he should be protected as far as can now be done. In the absence of said

parties it would not be proper for this Court to express an opinion as to whether said deeds from them to said Donahue are sufficient to pass their title to the said land in controversy in this suit or not, but it was error to have made the original sale to Gray without having them before the court and it was also error for the court by its said decree of November 7, 1879, to direct a re-sale of said land in the absence of said parties.

For the reasons stated, I am of opinion that said decree of November 7, 1879, is erroneous, in the particulars mentioned, and that it must be, therefore, set aside and reversed with costs to the appellant. And the cause is remanded to the said circuit court with leave to the plaintiffs to amend their bill by making the said grantors parties and when their bill is so amended the said circuit court is directed to proceed in the cause according to the principles announced in this opinion and further according to the rules, principles and practice of courts of equity.

THE OTHER JUDGES CONCURRED.

DECREE REVERSED.

WHEELING.

McCONIHA *et al.* v. GUTHRIE, JUDGE, &c., *et al.*

Submitted August 19, 1882—Decided December 9, 1882.

1. Some of the general principles of law stated, governing writs of prohibition, their uses and application. See opinion. (p. 140.)
2. The rule is well established, that where the inferior court has originally jurisdiction of the cause, the writ of prohibition will lie only where such court, during the proceedings or in the conduct of the trial, clearly exceeds its legitimate powers in some collateral matter arising in the cause over which it has no authority; but unless it has so exceeded its authority, on an application for such writ the court above will not enquire whether it has decided right or not. (p. 142.)
3. The inferior court having general jurisdiction of the subject matter, it has the right and authority to determine, whether or not it has acquired jurisdiction of the particular case by a sufficient

service of process or notice upon the defendant. And any error committed in that regard will not be an excess or abuse of its jurisdiction, but an error in adjudicating a matter within its legitimate authority, and the remedy for such error is by writ error or *certiorari*, and not by writ of prohibition. (p. 142.)

4. The courts do not favor the repeal of a statute by implication; and in construing a prior and a subsequent statute, relating to the same subject matter, the latter will not be held to be a repeal of the former, unless the repugnancy between them is irreconcilable; and consequently, where the prior statute is general in its terms and prohibits the taking of a certain species of property in any case whatever, and the subsequent statute is limited or special in its terms and authorizes the taking of such property in certain described localities only, the latter will be held to be a limitation or qualification of the former, and the prohibition will apply to all cases except to the localities thus specified in the subsequent statute; and an express repeal of the qualifying statute will restore the prohibition in the general statute to its original force, and it will then operate as though the qualifying statute had never existed. (p. 148.)

5. Section 5 of chapter 52 of the Code, as amended by chapter 88 of the Acts of 1870, is in force in this State; and therefore, if a judge of the circuit court, having general jurisdiction of proceedings to condemn lands for railroad purposes, on the application of a railroad company entertains such proceedings and appoints commissioners to view and ascertain the compensation to be paid for lands, on which there are dwelling-houses of the owners, without the consent of such owners, and makes an order that such railroad company may, upon paying into court the compensation ascertained by such commissioners, take such lands for the use of its railroad, without excepting such houses and a space within twenty feet of each of them, as provided in said section 5, he thereby exceeds his legitimate powers, and a writ of prohibition will be awarded by this Court, on the petition of such owners, to prohibit him from proceeding therein and said railroad company from invading or taking such houses or the land within twenty feet of any of them. (p. 149.)

A petition by James D. McConiha and others for a writ of prohibition against F. A. Guthrie, judge of the circuit court of the county of Kanawha, and the Winifrede Railroad Company to restrain the said judge and the said company from all proceedings for the condemnation of certain lands, houses, &c.

The facts of the case are fully stated in the opinion of the Court.

James H. & James F. Brown, James H. Ferguson and E. Willis Wilson attorneys for petitioners.

E. B. Knight and William H. Hogeman attorneys for defendants.

SNYDER, JUDGE, announced the opinion of the Court:

James D. McConiha trustee and others, on the 26th day of July, 1882, presented to a judge of this Court, in vacation their petition for a writ of prohibition against F. A. Guthrie judge of the circuit court of Kanawha county and the Winifrede Railroad Company. The said petition represents, that on the 12th day of June, 1882, the said railroad company filed its petition in the circuit court of Kanawha county to take and acquire the title to certain lands of petitioners therein described; that such proceedings were had thereupon that, on the 8th day of July, 1882, said circuit court adjudged that said applicant had lawful right to take said lands for the purposes stated in said petition and appointed commissioners to ascertain the just compensation to be paid petitioners for the same; that petitioners objected to said court entertaining said application and proceeding on said petition, because, it neither had jurisdiction of the persons of all or any of petitioners, nor of the subject-matter of controversy, and presented said objections by motions, pleas and otherwise; that said commissioners have not yet proceeded to execute their authority except to go upon said lands to view the same, but have appointed the 31st day of July, 1882, as the day upon which they will proceed to hear evidence and execute said authority.

"Your petitioners now allege that it is an usurpation and abuse of power upon the part of said circuit court to entertain jurisdiction upon said petition and application and proceeding to condemn said lands, and that said court has exceeded its legitimate powers therein; because, *First*—Notice of said application was not given to any or either of your petitioners as required by law; *Second*—Dwelling houses of your petitioners are situated upon the lands proposed to be taken; and *Third*—Other defects of jurisdiction appearing upon the record."

The said petitioners, therefore, pray that a writ of prohibition issue, &c.

Pursuant to the prayer of said petition the said judge of this Court awarded a rule against said F. A. Guthrie, judge, &c., and the said Winifrede Railroad Company to show cause &c., returnable to this Court, at its session in Charlestown, on the 19th day of August, 1882.

The said F. A. Guthrie, judge, &c., and the said Winifrede Railroad Company appeared in Court on the said 19th day of August, 1882, and filed separate answers to said petition and rule. The said railroad company, in its answer, says: "1st. That sufficient and legal notice of the application mentioned in said petition, made by this defendant to said circuit court of Kanawha county, to take certain property, set out and described in said petition and the plats exhibited therewith, was given in the mode and manner required by law to all parties entitled to such notice; and whether such notice was given or not was a matter within the province and jurisdiction of the said circuit court to try and determine, and if any error has been committed by the said court in the adjudication of that matter, the remedy is by appeal to this Court and not by writ of prohibition. 2d. That it is true there is a dwelling house upon each of the lots of land proposed to be taken by this defendant in said application, designated on the plats and in the pleadings in the record, as lot No. 1 and lot No. 3; but there is no dwelling house upon the lot proposed to be taken by this defendant in said application, designated on said plats and in said pleadings, as lot No. 2.

"And the defendant denies that the fact that there is a dwelling house upon each of said lots, Nos. 1 and 3, in any way interferes with or obstructs the defendant's right to take the same upon paying to the parties entitled thereto the compensation and damages required by law, or in any way deprives the said circuit court of its jurisdiction to try and determine the defendant's application to take said lots and to ascertain and adjudicate in the manner required by law the compensation and damages the defendant shall be required to pay therefor. 3d. That there are no defects whatever in jurisdiction appearing upon the said record.

"That no reason whatever is shown in said petition and record why the said circuit court should not entertain jurisdiction of the aforesaid application of the defendant as to the said lot No. 2, and try and determine the same, and no sufficient and valid reason is shown why the said circuit court should not entertain jurisdiction of said application and try and determine the same as to the said lots Nos. 1 and 3.

"Wherefore the said defendant prays that the said writ of prohibition do not issue."

The record exhibited with the aforesaid petition shows : that the said Winifrede Railroad Company is a corporation created by and under chapter 17 of the Acts of 1881 of this State, and its charter is dated November 16, 1881; that on the 20th day of May, 1882, the said railroad company gave the petitioners, Jas. D. McConiha trustee and others, written notice that it would, on the 12th day of June, 1882, apply to the circuit court of Kanawha county for the appointment of commissioners to view and ascertain compensation to the owners for certain tracts of land situate in Kanawha county between the Chesapeake and Ohio railway and the Kanawha river above the mouth of Field's creek, "which tracts of land *will be* more fully described in the within application and accompanying plat *to be filed* in said court on the day aforesaid," and that application will also be made for such orders and proceedings as may be necessary to invest the railroad company with a fee simple title to said tracts of land, which are required and intended to be appropriated by it for the use of its railway; that on the said 12th day of June, 1882, the said Winifrede Railroad Company filed in said circuit court its written application or petition accompanied by plats fully describing the lands proposed to be taken; that the lands thus described consist of three lots or parcels, the *first* containing three acres, two roods and twelve feet, the *second* one acre, one rood, thirty-eight poles and sixty-three feet, and the *third* one acre, thirty poles and ten feet, designated respectively as lots Nos. 1, 2 and 3; that on the 8th day of July, 1882, the defendants, James D. McConiha trustee and others, by their counsel appeared for the special purpose, and none other, of the moving to strike

said application and proceeding from the docket of said court, because the same had not been properly matured for hearing and trial, and because the notice aforesaid was insufficient, which motion the court overruled; that the said defendants then demurred to said application and said demurrer having been overruled, the defendants tendered twenty-five pleas, all of which were objected to by the applicant and rejected by the court except plea No. 9 on which issue was joined, tried by the court and found for the applicant; that thereupon the court, on the motion of the applicant, appointed commissioners, pursuant to the statute, to view the three lots of land aforesaid and ascertain what will be a just compensation to the owners therefor, &c.; that to the action and rulings of the court the defendants excepted and their bills of exceptions are made part of the record, and from them it appears that the defendants, James D. McConiha trustee and others, objected to the condemnation of the lands and each part thereof mentioned in the applicant's petition, and to the appointment and selection of commissioners to ascertain the compensation for said lands upon the following grounds: *First*—Because no proof has been made or offered by the applicant, the Winifrede Railroad Company, that the said lands or any part thereof, are intended to be appropriated to any public use or for any purpose of public utility; *Second*—Because no proof has been offered that said lands are necessary for the building, construction or operation of the railroad of the applicant; or that they are in any way necessary for the corporate purposes of said railway; *Third*—Because said lands are not, nor is any part thereof, in any way necessary for the building, construction or operation of said railroad, or for any of the corporate purposes of said railroad company for which it can under the law condemn real estate; and *Fourth*—Because there are dwelling-houses belonging to defendants on said lots Nos. 1 and 3, which will in violation of law be taken and invaded by the said railroad company, if said lots or either of them are condemned.

There were several other grounds of exception and objection made by the defendants, but those given are sufficient to show the nature and character of the defense. These defenses were made by pleas which were rejected, and other-

wise, in such form as to present to this Court the points raised or intended to be raised, at least, I shall, for the purposes of this case, so regard them, and proceed to consider these matters on their merits so far as may be done in this proceeding.

Before proceeding to determine the particular questions presented by this case, I shall state some of the general principles of law governing writs of prohibition which it is necessary to refer to in order to determine said questions.

1.—The power of this Court to award writs of prohibition is conferred by the Constitution; and the cases in which it may be awarded are prescribed by the statute as follows:

“The writ of prohibition shall be, as matter of right, in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy; or, having such jurisdiction, exceeds its legitimate powers.” Sec. 1 chap. 153 Acts 1881, page 487.

2.—Prohibition, like all other extraordinary remedies, is to be resorted to only in cases where the usual and ordinary forms of remedy are insufficient and inadequate to afford redress. And it issues only in cases of extreme necessity; and before it can be granted it must appear that the party aggrieved has no available remedy in the inferior tribunals. The jurisdiction is exercised by appellate and superior courts, to restrain inferior courts from acting without authority of law, or exceeding their legitimate powers, where damage or injustice are likely to follow from such action. *Supervisors v. Wingfield*, 27 Gratt. 329.

3.—It is an original remedial writ, and is the remedy afforded by the common law against encroachments of jurisdiction by inferior courts, and is used to keep such courts within the limits and bounds prescribed for them by law, and should, therefore, in all proper cases, be applied without hesitation. But it does not lie for errors or grievances which may be redressed, in the ordinary course of judicial proceedings, by appeal or writ of error. It is a fundamental principle and one which will be strictly enforced, that this writ is never allowed to usurp the functions of a writ of error or *certiorari*, and can never be employed as a process for the correction of errors of inferior tribunals. The courts will not permit a writ, which proceeds upon the ground

of an excess or usurpation of jurisdiction, to become an instrument itself of usurpation, or be confounded with a writ of error which proceeds upon the ground of error in the exercise of a jurisdiction which is conceded. It does not lie to prevent a subordinate court from deciding erroneously, or from enforcing an erroneous judgment in a case in which it has a right to adjudicate. In the application of the principle, it matters not whether the court below has decided correctly or erroneously; its jurisdiction of the matter in controversy being conceded, prohibition will not lie to prevent an erroneous exercise of that jurisdiction. *Wilson v. Berkstresser*, 45 Mo. 283; *Ex Parte Peterson*, 33 Ala. 74; *Ex Parte Green*, 29 Id. 52; *Ex Parte Smith*, 34 Id. 455; *People v. Wayne Cir. Ct.* 11 Mich. 393; *People v. Court Com. Pleas*, 43 Barb. 278; *State v. Nathan*, 4 Rich. (Law) 513; *The People v. Marine Ct.* 36 Barb. 341.

4.—It follows necessarily from the doctrine just laid down, that mere errors, irregularities or mistakes in the proceedings of the interior court, however gross or palpable, are not sufficient warrant for granting a prohibition where such court has jurisdiction of the subject matter in controversy. And where such inferior court has general jurisdiction of the subject matter, it must exercise its own judgment of the sufficiency of the process by which it acquires jurisdiction of the special subject or person in any particular case, and an erroneous judgment in that regard is not ground for a writ of prohibition, but is the subject of a writ of error. But this general rule is subject to this modification, that where, the inferior courts having a general jurisdiction of the subject matter in controversy, it clearly appears that in the conduct of the trial they have exceeded their legitimate powers in some matter pertaining thereto, for which there is no adequate remedy in the ordinary course of proceeding, the writ of prohibition will lie in such cases under our statute and under the general principles of law—*Washburn v. Phillips*, 2 Metc. (Mass.) 296; *Superrisors v. Gorrell*, 20 Gratt. 484, 522; *Swinburn v. Smith, Judge*, 15 W. Va. 483, 501; *State v. Nathan*, 4 Rich. 513; *Quimbo Appo v. The People*, 20 N. Y. 531; *Michond v. The Judge*, 20 La. Ann. 239; *Clayton v. Heidelberg*, 17 Miss. 623; *Sweet v. Hulbert*, 51 Barb. 312; *High's Ex. L. Rem.* §§ 771, 772.

In *ex parte Ellyson*, the court says: "We cannot enquire whether the court had jurisdiction and authority in the *particular* case. That would be to convert a writ of prohibition, which proceeds upon an excess of jurisdiction, into a writ of error, which proceeds upon an error in the exercise of jurisdiction." 20 Gratt. 24. The rule seems to be well established that, where the inferior court has, originally, jurisdiction of the cause, prohibition will lie only in cases where such court, during the conduct of the trial, clearly exceeds its proper jurisdiction or powers in some collateral matter arising on the trial, but unless it has so exceeded its authority, on an application for a prohibition, the court above will not enquire whether it has decided right or not. 3 Bl. Com. 112; *Washburn v. Phillips*, 2 Metc. 296.

Let us apply these general principles to the case before us.

It will be conceded that the circuit of Kanawha county was invested by law with jurisdiction to condemn real estate for public uses. This jurisdiction, as to the manner of proceeding is statutory; and, therefore, in order to divest the title of the owner of the land proposed to be taken, the mode prescribed by the statute must be strictly pursued, as it confers the only authority possessed by the court in such proceedings. But while the authority is statutory, it is nevertheless, general, and on an application for a writ of prohibition, the court will treat it in the same manner as if it were a proceeding under the common law. Such being the case, it seems to me, to be very clear that the petitioners' objection for the want of proper notice of the application, cannot avail them in this proceeding. The sufficiency of the notice, or the service thereof, was a matter of which the circuit court clearly had jurisdiction and it had the right and authority to adjudicate that matter. If any error was committed in its decision of that question such error could not be regarded as an excess of jurisdiction, but an error in adjudicating a matter of which it had undoubted jurisdiction, and the remedy by writ of error is ample for its correction.

Of the same character are the grounds of objection, alleged by the petitioners in this Court, that the circuit court improperly overruled their demurrer to the application and rejected the pleas offered by them. Whether there was **any**

proof of the purpose, for which the land sought to be taken, was to be used, whether it was necessary for the corporate purposes of the applicant, or whether it was intended to be used for purposes of public utility, were all matters within the proper authority and jurisdiction of the circuit court, and having such authority and jurisdiction, although it may commit gross and palpable errors and the proceedings may abound in imperfections and irregularities, still it cannot be held to have exceeded its jurisdiction, but it will be regarded simply as an erroneous exercise of its legitimate powers. To permit a writ of prohibition for such matters would be to confound such writ with a writ of error or *certiorari*. To grant a writ of prohibition on such grounds would be an attempt to deprive the circuit court of a jurisdiction which the law in its wisdom thought proper to give it; whereas this Court is only allowed to issue the writ to prevent the abuse or usurpation of a jurisdiction which it does not possess. If this Court were to grant the writ for such error, or supposed error, every such error or supposed error committed by the inferior court during the trial or in the proceedings of an action or suit, would create a separate ground for an application to this Court for such writ, and thus there would be no end to the controversy. We are, therefore, of opinion that prohibition does not lie for all or any one of said causes or alleged grounds. The remedy by writ of error is ample and must be resorted to if petitioners feel themselves aggrieved and desire redress.

This brings us to the only remaining ground relied on by the petitioners, which is, that there are dwelling houses belonging to petitioners on the lands proposed, and allowed by the circuit court, to be taken by the applicant, the Winifrede Railroad Company, which are about to be invaded without the consent of the owners, the petitioners. The said Winifrede Railroad Company in its answer filed in this Court to the petition of petitioners admits that there is a dwelling-house upon each of the lots of land proposed to be taken by it, designated in its application as lot No. 1 and lot No. 3, but denies that there is any dwelling-house on lot No. 2; and, also, denies that the fact that there is a dwelling-house upon each of said lots Nos. 1 and 3 in any way interferes with or obstructs its right to take the same upon paying to the par-

ties entitled thereto the compensation and damages required by law.

There is no proof in the record to show that there is any dwelling-house on the said lot No. 2, and as the said answer denies that there is any, this Court must hold that there is none on said lot No. 2.

It being conceded then that there is a dwelling-house of the petitioners upon each of said lots Nos. 1 and 3, which will be invaded if the said lots are condemned and taken by said Winifrede Railroad Company, the question presented is, is that fact a sufficient ground for awarding a writ of prohibition in this case? The determination of that question involves two enquiries: *First*—Whether a dwelling-house can be taken or invaded for a public use without the consent of the owner? And *Second*—If not, does the writ of prohibition lie to prevent the taking or invasion thereof?

First—Can a dwelling-house be taken, without the owner's consent, for public uses? The power of eminent domain is an inseparable incident of sovereignty and its exercise to accomplish lawful objects is conferred by our Constitution upon the Legislature of the State, which, subject to certain limitations, is authorized to declare by general laws the manner in which it may be exercised. The power to take private property for public use, without the owner's consent, being in derogation of the rights of the citizen, the statutes conferring such power must be strictly construed for the protection of the private rights of the citizen. The power being thus conferred by the organic law, upon the Legislature, to declare, by general laws, the manner in which the right of eminent domain may be exercised, in order, therefore, to determine what property may be condemned, we must look to the acts of the Legislature on that subject.

In March 1837, the first general statute for the incorporation of railroad companies was passed by the General Assembly of Virginia. In section 9 of said statute it is provided, that: "Previously to the institution, and during the pendency of proceedings for ascertaining the damages to the proprietor for condemnation of his land for the use of the company, the president and directors, their officers, agents and servants, shall have full power and authority to

enter upon all lands and tenements through which they may desire to conduct their railroad, and to lay out the same according to their pleasure, so that no dwelling-house, or space within sixty feet of one, belonging to any person, be invaded without his consent, and if they think the interest of the company requires it, to take possession thereof for the purpose of the company;” p. 104 section 9, chapter 118, Acts 1836-7.

In the revisal of 1849, a statute was reported and adopted as a section of the Code, which, after providing that companies incorporated for works of internal improvements may enter lands as provided in the above, declares: “Nor shall a company, under any provision in this chapter, invade the dwelling-house of any free person, or any space within sixty feet thereof, without the consent of the owner.” Section 4, chapter 56, Code of Virginia, p. 323.

Under this statute it was decided that a dwelling-house and a space of sixty feet about it were exempt from invasion by a railroad company. *R. & Y. River R. R. Co. v. Wicker*, 13 Gratt. 375.

Section 5 of chapter 52 of the Code of this State is in the same language as section 4 of chapter 56 of the Code of Virginia above mentioned; and chapter 88 of the Acts of 1870, is also in the same language, except that it uses the words “twenty feet” instead “sixty feet,” and contains this proviso: “And provided further, that this act shall not apply to any city or incorporated town.”

In *Ches. & O. R. R. Co. v. Pack*, 6 W. Va. 397, this Court held, that this statute forbids the invasion of a dwelling-house and any space within twenty feet of it by a railroad company, not only for the acquisition of the land by proceedings for condemnation, but for experimental and preparatory purposes. And, also, that the proviso, while it withdrew the protection from invasion entirely in cities and towns, it did not withdraw it from dwellings and lands in the country. This decision was made in July, 1873.

On the 3d day of April, 1873, the Legislature of this State passed an act, providing for the incorporation of associations that may be organized for the construction and operation of railroads. The mode and manner of condemning property for the purposes and uses of railroads are prescribed by sec-

tion 18 of said act, and section 20 provides that the officers and agents of a railroad company may enter upon lands for the examination and surveying of the route of its proposed road. Section 41 of said act is as follows:

41. "Any railroad company heretofore organized and extending into and through this State, or that may organize under this act, shall have power and authority to build and construct their line of railroad, branch or branches, through any gorge, defile, causeway, or narrow ravine, along any stream or river, by, over, under, near to, by the side of, or through any house, outhouse, building or inclosure—burial grounds and cemeteries excepted—by paying or securing to be paid for all such, or the damage occasioned thereto, as shall be agreed upon by the company, and the party or parties, owner or owners, such amount or price therefor as shall be mutually agreed upon by and between the parties in interest, and in case they shall fail to agree upon terms of settlement for such damage, their adjustment and settlement shall be made as herein provided."

Section 42 declares, that:

42. "All general laws of this State in relation to railroad corporations, and the powers and duties thereof, so far as the same are not inconsistent with the provisions of this act, shall remain in force and be applicable to railroad corporations organized under this act," &c.

And section 45 is as follows:

45. "This act shall take effect from and after its passage, and all acts and parts of acts inconsistent with the provisions of this act are hereby repealed."

On March 14, 1881, the Legislature passed an act to amend and re-enact chap. 54 of the Code, and to repeal chap. 88 of the Acts of 1872-3.

Sections 1, 48 and 70 of said act are as follows:

1. "Joint stock companies, incorporated under this chapter, shall be subject to the provisions of the *fifty-second* and *fifty-third* chapters of the Code, so far as the same are applicable."

48. "If any such corporation shall be unable to agree with the owner of any real estate for the purchase thereof for its corporate purposes, it may have such real estate condemned

for such purposes under the provisions of chapter 42 of this Code."

70. "All laws of a general nature in relation to railroad corporations now in force in this State, so far as they are not inconsistent with the provisions of this chapter, in relation to such corporations, shall remain in force and be applicable to railroad corporations organized under this chapter," &c.

The 74th section expressly repeals the act of April 3, 1873—chap. 88 Acts of 1872-3—and all acts and parts of acts amending the same—chap. 17 Acts 1881.

Chapter 42 of the Code, referred to in section 48 above quoted, defines the purposes for which real estate may be taken without the owner's consent and prescribes the manner of proceeding for its condemnation. Section 20 of said chapter provides, that after a report, by commissioners of the compensation to be allowed for land taken, has been made, whether it has been set aside or recommitted, or not, the applicant upon paying into court the compensation so reported, may take the land for the purpose specified in the application. "And no order shall be made, or any injunction awarded, by a court or judge, to stay him in so doing, unless it be manifest that the applicant is insolvent, or that he or his officers, agents or servants are transcending their authority, or that such interposition is necessary to prevent injury which cannot be adequately compensated in damages"—chap. 18, § 20, Acts 1881.

I have now given all the statutes which have, as I conceive, any bearing, directly or indirectly, on the enquiry before us. The only question to be determined under this enquiry is, whether the said section 41 of the Act of April 3, 1873, by implication or otherwise, repeals the aforesaid chapter 88 of the Acts of 1870?

It must be conceded that there is no express repeal. The 45th section of said act of 1873, declares that "all acts and parts of acts inconsistent with the provisions of this act are hereby repealed." Are the said acts inconsistent? The act of 1870, is general, and without exception or qualification, and declares that no dwelling-house shall be invaded. The said 41st section of the act of 1873, is special and qualified in its terms. It declares that any railroad company shall

have power to construct their line of road through any gorge, defile, causeway or narrow ravine, along any stream or river by the side of or through any house, outhouse, building or enclosure. It seems to me that by reasonable construction, taking into consideration the facts and circumstances hereinafter stated, the true intent and meaning of the terms here employed are, to give such company the power, in cases where its line of road passes through any gorge, defile, causeway or narrow ravine, &c., to construct their road by the side of or through any house, &c. If that was not the intention, then the words "gorge, defile, causeway or narrow ravine, along any stream or river," are entirely useless and without meaning. The general statutes giving to railroad companies the power to condemn real estate never did, and certainly did not at the time said statutes were passed, exempt gorges, defiles, causeways, narrow ravines, &c., from condemnation. But they did, as we have seen exempt dwelling-houses, and as it might be impracticable, if not impossible, to avoid taking or passing within twenty feet of a house in the construction of a road through a gorge, defile, &c., the Legislature deemed it proper to make an exception or qualification in the general law, prohibiting the taking of a house anywhere or under any circumstances, and permit the taking of houses in such gorges, defiles, narrow ravines, &c. Thus construed, there is no inconsistency in the two statutes. The later statute is merely an exception, limitation or qualification upon the prior statute. They can with perfect consistency stand together, and when reasonably construed, prohibit the taking or invasion of any dwelling or any space within twenty feet of one, except where the line of road is through any gorge, defile, &c., then such prohibition shall not apply.

But, if the interpretation we have given these statutes were doubtful, the rules of construction would, nevertheless, lead to the same conclusion; because a statute can be repealed only by express provision of a subsequent law, or by necessary implication. To repeal a statute by implication there must be such a positive repugnancy between the provisions of the new law and the old, that they cannot stand together or be consistently reconciled. *Wood v. United States*, 16 Pet. 342; *Brown v. County Com'rs*, 21 Pa. St. 37; *Magruder v. The State*, 40 Ala. 347; *Mills v. The State*, 23 Tex. 295.

In *Ches. & O. R. R. Co. v. Hoard*, 16 W. Va. 270, this Court held that: "A statute general in its terms and without negative words will not be construed to repeal by implication the particular provisions of a former statute which are special in their application to the particular case or class of cases, unless the repugnancy be so glaring and irreconcilable as to indicate a legislative intent to repeal."

In *McCool v. Smith*, 1 Black 470, Justice Swayne said: "A repeal by implication is not favored; the leaning of the courts is against the doctrine, if it be possible to reconcile the acts of the Legislature together." Sedgw. on Const. Stat. 106.

These authorities, I think, establish the doctrine, that in construing a prior and subsequent statute, relating to the same matter, the courts will not hold the latter to be a repeal of the former, by implication, unless the repugnancy between them is irreconcilable; and consequently, where the prior statute is general in its terms and prohibits the taking of certain property in any case whatever, and the subsequent statute is special in its terms and authorizes the taking of such property in certain described localities only, the latter will be held to be a limitation on, or a qualification of, the former, and the prohibition will continue in all cases except in the localities specified in the subsequent statute.

Chapter 88 of the Acts of 1870, being simply an act to amend and re-enact section 5 of chapter 52 of the Code, the said section, as thereby amended, continued to be and still is a part of said chapter 52 of the Code. And section 74 of chapter 17 of the Acts of 1881, expressly repeals the said act of April 3, 1873, and section 1 of the same act of 1881, declares that joint stock companies incorporated under said act shall be subject to the provisions of said chapter 52 so far as the same are applicable. Thus the said section 5 of chapter 52 being unrepealed, as we have seen, and said act of April 3, 1873, containing the aforesaid section 41, having been expressly repealed, it follows, necessarily, that the prohibition declared in said section 5 of chapter 52 of the Code, was, on the 16th day of November, 1881, when said Winifrede Railroad Company was incorporated, in full force and entirely relieved of the exception or qualification in section 41 of

the said act of April 3, 1873; and, therefore, neither a dwelling-house nor space within twenty feet of one, belonging to the owner of the land, can be taken or invaded for a public use without the owner's consent.

Second—Does the writ of prohibition lie to prevent the taking or invasion of such dwelling-house and twenty feet of land for a public use? It is, as before stated, very clear that the circuit court, in the case before us, had, originally, general jurisdiction of the subject-matter in controversy. If the writ lies, then it can only do so, because said court has exceeded its legitimate powers in awarding the condemnation of dwelling-houses. The statute is mandatory and declares, in express and positive terms, that a company shall not invade a dwelling-house or any space within twenty feet thereof. There are no circumstances under which such houses and lands can be invaded. The company has no discretion, nor can the court, to which it applies for the enforcement of its rights, exercise any discretion or confer upon it any rights or authority which the law thus expressly denies to it. The question of the right to condemn such houses and lands arose incidentally or collaterally during the proceedings, and the court having no jurisdiction or power to condemn or invade the same, clearly exceeded its legitimate powers in appointing commissioners to invade such property. The action of the court in this matter was not an erroneous exercise of conceded jurisdiction, as was the case in the particulars hereinbefore considered, but was entirely without authority or jurisdiction. For this excess or abuse of authority the petitioners have no remedy in the ordinary course of procedure, in said circuit court or by writ of error. By section 48 of chapter 42 of the Code, hereinbefore given, the court is prohibited from making any order to stay the company from invading the property reported for condemnation, unless the company is insolvent or to prevent irreparable injury. And even if said circuit court had power to make such order, it would be hopeless, if not absurd, to apply to it for such order after it had decided that the property was subject to condemnation. Nor could there be in such case adequate redress by writ of error to the Appellate Court, for, in all probability, before the proceedings had so far progressed as

to entitle the owner of the property to such writ the house would have been removed and the railroad constructed over its ruins. I am, therefore, of opinion that the rule awarded herein, on the 26th day of July, 1882, as aforesaid, against F. A. Guthrie, Judge, &c., and the Winifrede Railroad Company be made absolute to the extent of prohibiting the said F. A. Guthrie, Judge, &c., from authorizing the said Winifrede Railroad Company, its officers, agents and servants to invade and the said company from invading the dwelling-houses of the petitioners, James D. McConiha trustee and others, or of either or any of them, situate on the lands in the petition and plats of the said railroad company filed in said circuit court and designated as lots Nos. 1 and 3 or any space within twenty feet of any such house or houses without the owner's consent. And it is ordered that the following writ of prohibition do issue accordingly, and that the said railroad company pay to the petitioners herein their costs in this behalf expended :

The Court for reasons stated in writing and filed with the record, is of opinion: First—The judge of a circuit court has power under the Constitution and laws of the State to entertain proceedings for the condemnation of land for public uses in the mode prescribed by chapter 18 of the Acts of 1881. Second—The said court having jurisdiction of the subject-matter of such proceedings, the writ of prohibition does not lie, unless, in some collateral matter arising during the progress thereof, it exceeds its legitimate powers by the exercise of authority over such collateral matter in violation of a positive inhibition of the law; and Third—The said Frank A. Guthrie, judge of the circuit court of Kanawha county, had no power to appoint commissioners to view, or authorize the Winifrede Railroad Company to take for its corporate purposes, without the consent of the owner, the dwelling-houses, or any of them, on lots Nos. 1 and 3 in the petition mentioned or the land within twenty feet thereof.

Therefore, it is adjudged and ordered that the motion to discharge the rule awarded in this case be overruled, and that a writ of prohibition be and is hereby awarded directed to the defendants commanding the said Frank A. Guthrie, judge as aforesaid, not to authorize the condemnation of and

the said Winifrede Railroad Company, its officers, agents and employes, not to take or invade for any purpose, without the consent of the owner, any dwelling-house on the lots of land designated as Nos. 1 and 3, in the said petition and record mentioned and described, or the land within twenty feet of any such house; and that so much of the orders heretofore made by said judge as appoints commissioners to view and ascertain compensation for said houses and twenty feet of land around each, and authorizes the said Winifrede Railroad Company, upon the payment of such compensation, to take said houses and land is hereby superseded and set aside. And it is further adjudged and ordered that the service of an office copy of this order upon the defendants shall have the same force and effect as the execution upon them of a writ of prohibition issued in pursuance hereof. And it is further adjudged and ordered that the petitioners, James D. McConahey, trustee, *et als.*, recover against the defendant the Winifrede Railroad Company their costs by them expended in the prosecution of this proceeding, which is ordered to be certified to the said circuit court of Kanawha county.

THE OTHER JUDGES CONCURRED.

WRIT OF PROHIBITION AWARDED.

WHEELING.

RUFFNER v. HILL *et al.*

Submitted January 13, 1881—Decided December 9, 1882.

(*SNYDER, JUDGE, Absent.)

If a circuit court enter up a judgment on the verdict of a jury, sworn to try the issue joined, in any case criminal or civil, including an action of ejectment where no issue has been joined, or no plea filed by the defendant, such judgment will for such reason only be reversed by the Appellate Court.

Writ of error and *supersedeas* to a judgment of the circuit court of the county of Kanawha, rendered on the 20th day of

*Case submitted before Judge S. took his seat on the bench.

21	152
34	65
34	655

21	152
40	238

21	152
43	128
43	188
43	822

21	152
47	678

21	152
53	80

21	152
57	73

21	152
63	508

21	152
65	14

December, 1875, in an action in said court then pending, wherein Joel Ruffner was plaintiff and G. W. Hill and others were defendants, allowed upon the petition of said defendants.

Hon. Joseph Smith, judge of the seventh judicial circuit, rendered the judgment complained of.

GREEN, JUDGE, furnishes the following statement of the case:

This was an action of ejectment instituted December 2, 1871, in the circuit court of Clay county, by serving on the defendants William Moore and John Mullins, a copy of the declaration and a notice addressed to all the defendants including G. W. Hill, that this declaration against them would be filed on the first day of the next April term. This notice was not served on the defendant G. W. Hill, he not being found in the county. The declaration was in the ordinary form of a declaration in ejectment, and was to recover a tract of land in said county of three hundred acres, more or less, whose boundaries are not set out in the declaration. The case was continued from time to time till the March term 1874, when the parties came by their attorneys and by consent in writing, and for reasons appearing to the court, the cause was transferred to the circuit court of the county of Kanawha.

On May the 11th, 1874, an order was entered in the circuit court of Kanawha, whereby it was ordered; that this cause be docketed in that court to be therein proceeded with. The next entry appearing on the records of that court, was entered on June the 8th, 1875, when the cause was continued. The next entry appearing on the record, was made December the 8th, 1875, and was as follows: "This day came the parties by their attorneys, and thereupon the demurrer of the defendants to the plaintiff's declaration being argued and considered, was overruled; and then came a jury to-wit: (naming them) who being selected by lot, empaneled and sworn the truth to speak upon the issue joined, and having heard the evidence in part, were adjourned until the next day, until which time the cause was continued."

The cause was in like manner, regularly continued from day to day till the evidence and arguments of counsel were heard in full; and on the 13th day of December the jury were sent out of court to consider of their verdict, and after sometime they returned, and upon their oaths did say, "that they found for the plaintiff the land in the declaration mentioned, which is laid down on the plat of surveyor Chapman made and filed in this cause and marked "verdict map;" by the letters C. F. G. L. and Q., which land is bounded as follows (giving the boundaries in detail), and they found, that the plaintiffs were entitled to the said land in fee simple; and they also found for the plaintiffs one cent damages." Whereupon, the defendants moved the court to set aside said verdict, and to award them a new trial, in the premises; and the court took time to consider thereof.

At another day, to-wit, at a circuit court held on the 20th day of December in the year 1875, "came again the parties by their attorneys, and thereupon the motion of the defendants to set aside the verdict of the jury rendered in this cause at a former day of this term, being argued and considered was overruled. Therefore it was considered by the court, that the plaintiff recover against the defendants the possession of the premises described in the verdict aforesaid, and his costs by him about his suit in this behalf expended, including the sum of fifteen dollars allowed by law, and the writ of possession was awarded him." And at another day, to-wit, on the 23d day of December, 1875, "came again the parties by their attorneys, and thereupon the defendants asked the court to sign four bills of exception tendered in this cause; and the court not then having time to examine said bills, execution upon the judgment in this cause was suspended until the adjourned term, or to the next regular term, which ever may first happen, to allow the court to examine said bills."

At the adjourned term of said court on February 3, 1876, after making some modifications in these four bills of exceptions, the judge signed them; but from delay and inadvertence on the part of the clerk and of the court, no order was entered at this special term showing, that these or any bills of exceptions had ever been signed, sealed or

enrolled. More than two years afterwards, on June 27, 1878, this state of the facts having been proven to the satisfaction of the court, the court on that day, on the motion of the defendant after due notice to the plaintiff, and after reading the affidavits filed by each party, and having listened to the arguments of counsel decided, that "said order filing said bills of exceptions, having been omitted to be entered upon the record through delay and inadvertence of the clerk and of the court, and that said bill of exceptions were duly tendered at the trial term of said cause, and were duly signed and sealed by the court (after some modification by the judge) at the adjourned term of the court, to-wit, on the 3d day of February, 1876, and ordered by the court to be made a part of the record and delivered to the clerk for that purpose, the court therefore did order that said four bills of exceptions numbered one, two, three and four respectively, be filed as of said 3d day of February, 1876, and made a part of the record of the case."

The defendants G. W. Hill, Wm. Moore and Joel Mullen, obtained from this Court a writ of error and *supersedeas* to the judgment, rendered against them on December 20, 1875, and presented as the record in said cause what has been above stated, including the affidavits considered by the court on June 27, 1878, and these four bills of exceptions, making a record of more than four hundred printed pages.

Since this was submitted to this Court, it has issued a writ of *certiorari* to bring up any omitted part of the record; it being supposed that by a clerical mistake the order which showed, that the defendants had filed a demurrer to the plaintiff's declaration and had plead not guilty, as well probably as the order of survey, had not been copied into the record. But the return of the writ of *certiorari* shows, that the record does not show the filing of any plea or demurrer or that any issue was made in the cause; but a private docket then kept by the judge of the court, as well as the docket kept by the clerk of the court show, the judge's docket being in his own handwriting, that there were orders which should have been entered at the May term 1874, in this cause, which never were entered. The judge on his docket for that term has written in what the clerk certifies is the judge's own

handwriting opposite this case on the docket under the heading "Orders made of this term," the words "Plea ord. sur. and cont." And under the same heading opposite this case, the clerk's docket of that term has these words, "general demurrer, plea not guilty, order of survey and contd."

The clerk certifies, that this is all in the handwriting of the then clerk, except the words "general demurrer," which are in the handwriting of the counsel for the defendant. But instead of the orders being made indicated on these dockets, the only one that was made, was an order of survey made by consent, which order also showed, that George W. Hill, who had not been served appeared and consented with the other parties to the making of this order of survey.

Swann for plaintiffs in error cited the following authorities: 4 Pet. 102, 107; 16 How. 14; 20 How. 221, 252; Powell App. Pro. 1 Cow. 65; Stan. Ky. Dig. pp. 138-9, 684; 11 W. Va. 692; 15 W. Va. 274-5; 9 Cranch. 173; 6 Lans. 15; 25 Barb. 449; Stan. Ky. Dig. pp. 157-8-9; Litt. Sel. Cas. 91; 4 Mon. 32; Stan. Ky. Dig. 1061-2; 2 Litt. 160; 8 Leigh 694. 30 Gratt. 419; 16 W. Va. 527; *Proctor v. Hill*, 10 W. Va. 63; *Brown v. Gates Treasurer*, 15 W. Va. 131; 9 Leigh 437; 1 Rob. 20; 1 H. & M. 497; 6 Fla. 72; 7 Gray 162; 4 McL. 442; 14 Texas 455; 4 Jud. L. R. p. 140; 27 Ga. R. 555; 2 How. 263; 8 Pick. 415; 43 N. B. 508; 18 Minn. 188; 25 Con. 337; 1 Gratt. 338; 11 W. Va. 692; 15 W. Va. 74-5; 18 How. 14; 20 How. 221, 252; 9 Ohio St. 526; 1 Conn. 65; 4 Pet. 102; 8 Ohio St. 261.

William H. Hogeman for defendant in error cited the following authorities: 27 Gratt. 534; Acts 1872-3 ch. 206 p. 594; 15 Gratt. 122; 9 Wheat. 657; 6 How. 275; 5 O. St. 56; 1 Otto 250; 6 Ga. 578; 3 A. K. Mar. 360; 4 Bush. 499; 12 Smede & M. 111; 10 Mo. 156; 17 N. J. L. 291; 22 N. J. L. 699; 26 N. J. L. 463; 19 Ohio 426; 6 O. St. 12; 23 Mo. 404; 25 Mo. 327; 3 Sneed (Tenn.) 77; 16 How. 4; 14 W. Va. 157; 1 H. & M. 25; 9 Johns. 78; 3 John. 139; 12 Gratt. 53; 15 W. Va. 323; 13 W. Va. 202; 4 Minn. 368; 29 Ver. 198; 5 W. Va. 540; 8 W. Va. 245; 12 W. Va. 209; 15 W. Va. 300; 10 Gratt. 1; 1 Leigh 216; 12 W. Va. 21; 2 Rob. 676; 15

Gratt. 204; 9 W. Va. 252; 2 Wash. 146; 8 W. Va. 417; 13 Gratt. 480; 4 Dev. & Bat. 164; 1 Dev. & Bat. 76; 6 Litt. (Ky.) 391; 3 W. Va. 28; 5 W. Va. 115.

GREEN, JUDGE, announced the opinion of the Court:

The first question to be determined in this case, is what portion of the record, which has been certified by the clerk of the circuit court, really constitutes a part of the record of this case and is to be read and considered by us.

The counsel for the plaintiffs in error insists, that upon the case, as we have stated it, the four bills of exception, which constitute nine-tenths of the record certified, are really a portion of the record to be considered by us.

On the other hand the counsel for the defendant in error insists, that the four bills of exception constitute no part of the record and cannot be looked at or considered by this Court.

It is unnecessary however for us to determine this question, for the reasons which we will presently state. The next enquiry is: Are the entries made according to the certificate of the clerk by the judge, on his private docket opposite this case, and similar entries made by the former clerk of the circuit court of Kanawha on his docket of cases, and which indicate, that a demurrer to the declaration was filed, as also a plea of not guilty, but which entries were never made on the record-book, to be regarded now as a part of the record in this case?

There are no authorities cited by the counsel of the defendants in error to justify us in regarding these private entries of the clerk and judge, as parts of the record; and I presume none can be found; for it seems obvious, that they can not be so regarded. The counsel of the appellee did not ask, that time should be given by us to permit an application to be made to the circuit court of Kanawha, to make these entries on the record book *nunc pro tunc* and thus endeavor to make them a part of the record, and we presume this request was not made, because it seems to be obviously impossible that such entries could be made at this time, to operate *nunc pro tunc*.

In *Sydner v. Burke*, 4 Rand. 163, Judge Cabell says: "The counsel for the appellee has exhibited the transcript of the

record of an order of the superior court, made at a term subsequent to that at which the judgment was rendered, showing that the court received the evidence of the clerk, that a plea had been regularly filed, and that issue was joined thereon, and directing the plea to be entered *nunc pro tunc*. But we cannot regard this transcript as any part of the record. In the case of *Vaughan & Field, executors of Field v. Freeland*, reported in a note to 2 H. & M. 477, this Court decided, that it was erroneous in the district court, *after the term* to amend the record, even by the written *minutes* of the clerk. It would be much more improper to allow such amendment founded on the mere recollection and oral testimony of the clerk."

In the case before us, the private memorandum of a judge no longer in office, and the docket of a clerk no longer a clerk, would have to be resorted to to make an order of the filing of a plea in this case *nunc pro tunc*. This clearly can not be done. We must therefore consider, that in the trying of this ejectment case, no plea was filed in the circuit court, and of course no issue was joined, and yet a jury was empaneled and sworn to try the issue joined, and they found a verdict for the plaintiff for the land in the declaration mentioned, and that he was entitled to this land in fee simple. On this verdict so procured, the court rendered on December 20, 1875, a judgment, that the plaintiff recover of the defendants the possession of the premises described in this verdict and his costs, and writ of possession was awarded him.

This is the judgment to which a writ of error has been granted; and it is clear, that it must be reversed without any regard to the merits of the case as set out in their bill of exceptions, for it is very well settled, that in no case either civil or criminal, can the court direct the empaneling of a jury and the trial of a case when no issue has been made up; and if this be done, as it was done in this case according to the record, the court below could not properly enter up any judgment on this verdict of the jury so rendered.

The cases are numerous both in Virginia and in this State, where verdicts and judgments have been set aside by the appellate court, only because the verdict was rendered when no issue had been joined. See *Stevens v. Taliaferro*, 1

Wash. 155; *Taylor v. Houston*, 2 H. & M. 161; *Kerr v. Dixon*, 2 Call 379; *Williamson's Adm'r v. Bennett*, 3 Munf. 316; *Sydnor v. Burke*, 4 Rand. 161; *McMillion v. Dobbins*, 9 Leigh 422; *Rowans v. Givens*, 10 Gratt. 250; *B. & O. Railroad Co. v. Gettle*, 3 W. Va. 376; *B. & O. Railroad Co. v. Christie*, 5 W. Va. 325; *Gallatin's heirs v. Haywood's heirs*, 4 W. Va. 1; *B. & O. Railroad Co. v. Faulkner*, 4 W. Va. 180; *State v. Conkle alias Swank*, 16 W. Va. 736; *State v. Douglas*, 20 W. Va. 770.

These decisions were rendered in a great variety of cases. In actions of debt, detinue, trespass on the case and *assumpsit*, and in writs of right and indictments for felonies. None of these however happen to be actions of ejectment; and it is now claimed by counsel for the defendants in error, that though in all other cases, either criminal or civil, the judgment of a court based on the verdict of a jury professedly on the issue joined, where in fact no issue appears by the record to have been joined, must be reversed by the appellate court. Yet such a judgment ought not to be reversed in an ejectment cause; because by the law Code of W. Va. ch. 90, § 13, p. 519, no other plea can be filed in an ejectment case except the plea of "not guilty;" and therefore it must be conclusively presumed that the jury were really sworn to try the issue on the plea of not guilty, though no plea was put in.

It is said, the only issue which could be made up, is the one actually tried, and it would be too technical to reverse, because the formality of entering the plea of not guilty was omitted. But these cases abundantly show, that the court has not reversed judgments entered upon such verdicts, because there was any doubt as to the real issue which the jury tried, nor because the defendant might have made up some other issue, if he had pleaded. The reasons for these decisions are entirely different from what this argument presumes. The real ground on which these decisions rest is, that by the common law the court has no right to make up the issue and empanel a jury to try it; but the parties by their pleadings must first come to an issue, and then it is tried by a jury. When therefore the record shows, that the parties by their pleadings have not come to any issue, but nevertheless the record shows that the issue was tried, this issue must either have been

illegally made up by the court or by a blunder it must have been assumed to have been made up by the parties, when in fact it was not.

In some of the cases we have cited, the record showed distinctly what was the exact issue tried by the jury, and also that the verdict was distinctly responsive to such issue; and that it was the only issue the parties in the particular case could have made, had they by the pleadings made any issue. Yet the judgments were reversed, because no issue so far as the record showed, had been formed. It has thus been held as absolutely necessary in every case, that an issue shall be made up by the pleadings, before a jury can be empaneled to try the case.

The *State v. Conkle alias Swank*, 16 W. Va. 736, and the *State v. Douglass*, 20 W. Va. show, that on indictments for felony, if the defendant does not plead, but the jury is nevertheless sworn to try the issue, which could be only on the plea of "not guilty," and he is found guilty of the felony charged in the indictment, though there can be no doubt, that precisely the same issue and verdict would have resulted, had the defendant put in the only plea he could have put in; yet this Court has nevertheless, reversed such judgments entered on such verdicts. The court having no authority to empanel a jury, in that or any case, till an issue has been made up by the parties; and therefore a verdict rendered by a jury when no issue has been so made up, must be treated as a mere nullity.

So in the cases of *Taylors et al. v. Huston*, 2 H. & M. 101; *Rowans v. Givens*, 10 Gratt. 250; and *Gallatin's heirs v. Haywood's heirs*, the jury were sworn in cases of writs of right, and rendered verdicts on which the courts entered up judgments. But in each of these cases the appellate court reversed the judgments because the record did not show, that the defendant had plead, or that any issue had been joined by the parties. Yet in these cases as in all other cases of writs of right, the jury were sworn in the words of the statute: "You shall say the truth whether C. D. hath more right to hold the tenement which A. B. demandeth against him by his writ or right, or A. B. to have it as he demandeth." Thus the issue actually tried by the jury in these cases, as

distinctly appeared on the face of the record as it could possibly have appeared, had the defendant put in his plea, and it is precisely the same issue as would have been tried, had the defendant filed his plea. Yet no plea having been filed so far as the record showed, the appellate courts set aside judgments on verdicts, rendered when the record showed distinctly the issue joined; and when it was precisely the issue which would have had to be formed by the parties, merely because it had not been formed by the pleadings of the parties.

The courts obviously acting on the principle, that by the common law and our universal practice, no jury can be empaneled and no case can be tried, till there has been an issue made by the pleadings of the parties, and that such was the case must appear by the record. It is obvious, that the jury can not be empaneled to try an issue never formed by the parties by their pleadings, any more in an action of ejectment than in a writ of right, for which it has been substituted. The same reasons applying in both cases, and indeed in all cases, whether civil or criminal. It is a fundamental principle of the common law, that the parties by their pleadings must come to issue before any cause can be disposed of or tried by a jury.

The attorneys for the defendant in error, rely on the case of *Douglass v. The Central Land Co.* 12 W. Va. 505, to sustain his position, that because there can be but one issue in an action of ejectment and but one plea in such action, the failure to put in this plea or form this issue, ought not to prevent the court from rendering a judgment on the verdict of the jury in such a case. In that case it was held, that as there could be but one conclusion to the plea of *non assumpsit*, and that conclusion was necessarily to the country, it was unnecessary formally to add to it, in order to make the plea good. This decision was obviously right, and in full accord with the decisions in Virginia and in this State.

But surely it is one thing for the courts after a verdict, to construe pleas liberally to sustain a verdict and judgment thereon, and in so doing carry out the liberal spirit shown by the Legislature in the statutes of jeofail; and quite a different thing for the courts to dispense with pleading altogeth-

er, and permit cases to be tried by juries in which the defendant has not plead at all, and allow judgments to be entered upon such verdicts.

For this reason the judgment of the circuit court of Kanawha, rendered on December 20, 1875 must be set aside, reversed and annulled, and the plaintiffs in error must recover of the defendant in error, his costs about his writ of error in this Court expended, and the verdict of the jury must also be set aside and annulled, and this cause must be remanded to the circuit court of Kanawha, to be further proceeded with according to the principles as laid down in this opinion and further according to law.

We deem it unnecessary to express any opinion on the question, whether the four bills of exception taken by the defendants below, under the circumstances set out in the statement of this case, constitute any part of the record in this case; as we take it for granted, that the court below when this case is again tried, will not adopt the unusual and very questionable practice of signing bills of exceptions under any circumstances, at a term of the court subsequent to the term at which the judgment is rendered. We therefore decline to decide, whether under the circumstances appearing in this case or whether under any circumstances, such a practice is allowable.

JUDGES HAYMOND AND JOHNSON CONCURRED.

JUDGMENT REVERSED. CASE REMANDED.

WHEELING.

HILL'S ADM'R v. MAURY *et al.*

Submitted June 26, 1882—Decided December 9, 1882.

(*SNYDER, JUDGE, Absent.)

1. A bill for a rehearing is properly dismissed, that shows no error in law in the decree sought to be reheard nor after-discovered evidence, which could not have been discovered before the decree was rendered by use of reasonable diligence. (p. 170.)

*Counsel below.

21	162
62	220

2. Where the answer insists, that new parties should be made defendants, because they have become interested in the land with the defendants, which land is sought to be subjected to the payment of the purchase-money, unless it appears, that they were interested in the land, when the suit was brought, it is not error to decline to make them parties. (p. 171.)
3. Where a number of persons purchased a large tract of land, and suit was brought to subject it to the payment of the purchase-money, and a deed is filed with the papers conveying the land to one of the defendants reciting therein, that said defendant had purchased the interests of the others, and in the decree for the sale of the land this deed is recognized as filed, and in the same decree a personal order is made against this defendant for a small balance of the purchase-money, and ordering the land to be sold, unless it was paid, and the said defendant files a bill of review, in which he does not object to the decree on this ground but virtually admits, that he alone is interested in the land, under these circumstances the personal decree against him is not to his prejudice. (p. 171.)

Appeal from and *supersedens* to two decrees of the circuit court of the county of Greenbrier, rendered respectively on the 27th day of May, 1878, and on the 1st day of June, 1880, in a cause in said court then pending, wherein John Hill's administrator was plaintiff and Robert H. Maury and others were defendants, allowed upon the petition of said Maury.

Hon. Homer A. Holt, judge of the eighth judicial circuit, rendered the decrees appealed from.

The facts of the case are fully stated in the opinion of the Court.

Richard L. Maury and *W. W. Gordon* for appellant cited the following authorities: 25 Gratt. 475; Dan. Chy. Pr. § 3 and note, 292, 293 and notes 7, 5; 17 How. 103; Dan. Chy. Pr. 246; 4 Min. Inst. Part I 150; Story Eq. Pl. § 72; 3 Gratt. 12-19; Calvert on Parties 116, 117; 2 Rob. Pr. 276, *et seq.*; *Id.* 14-19; 8 Gratt. 281; 25 Gratt. 375; 4 Rand. 451; 25 Gratt. 840; 9 Gratt. 273; 9 Wall. 510; 3 Munf. 29; 32 Gratt. 74; 1 Leigh 80; 11 Leigh 559.

Price & Preston for appellee cited the following authorities: Code ch. 181, § 5; 18 Gratt. 365.

JOHNSON, PRESIDENT, announced the opinion of the Court:

This is a suit in equity in the circuit court of Greenbrier county to subject land to the payment of the purchase-money. The bill was filed in 1859, in the name of John Hill, plaintiff against R. H. Maury, Henry L. Brooke, James Hunter, Philip B. Dandridge and Samuel S. Thompson. By the contract exhibited it appears, that Hill sold to the said parties defendants "a certain tract of land, principally if not entirely, in Nicholas county, Virginia, which was granted to Jacob Skiles as a tract containing thirty-two thousand and ninety-seven acres then in Kanawha county; and which land was conveyed by said Skiles to Andrew Moore, and by his heirs conveyed to said John Hill. It is situated on Gauley and Twenty Mile creek and other waters. The sale was made subject to certain reservations for sales which said Hill had theretofore made, and for prior and conflicting claims, as shown upon a map now in the possession of the said Philip P. Dandridge, prepared and made out by Samuel A. Beckley, and a reservation on the map embracing the mill and made for the benefit of said Hill. Also the reservation of the timber upon one thousand acres above the saw mill of said Hill, commencing one and one-half miles above the saw mill on the south side of Twenty Mile creek, and to run with the creek and the top of the mountain between said creek and Gauley river for quantity. Upon the payment of the purchase-money, or upon receiving sufficient assurance of its payment according to contract, the said Hill binds himself and his heirs to make to the parties of the second part, a good and sufficient deed of conveyance with general warranty free from all incumbrances for the tract of land aforesaid, subject to the reservations aforesaid. The parties of the second part, on their part, agree and bind themselves to pay for said land fifty cents per acre, in the following manner, &c."

Not long after the bill was filed, all the defendants appeared and answered the bill, claiming payments and insisting, that the title to portions of the lands was not good. In the joint answer is this averment: "These respondents further answering say, that the respondent, Henry L. Brooke, has parted with all his interest under the contract with the complainant and, that the persons now interested in the said con-

tract are the other respondents, who are interested to the extent of one seventh each; and, that the Hon. R. M. T. Hunter, of the county of Essex, is also interested to the extent of one seventh; that B. W. Morris, of the county of Caroline, is likewise interested to the extent of one seventh and one fourth of another seventh; that Edward W. Morris and George Fleming, of the county of Hanover, are together interested to the extent of one fourth of one seventh; that A. M. Morris, of the county of Caroline, is interested to the extent of one fourth of one seventh, and that the Hon. Muscoe R. H. Garnett, of the county of Essex, is interested to the extent of one fourth of one seventh. These respondents therefore submit, that the said Hon. Robert M. T. Hunter, B. W. Morris, E. W. Morris, George Fleming, A. M. Morris and Muscoe R. H. Garnett should be made parties defendants in order that a proper and just decree may be pronounced."

It will be observed, that the answer does not state *when* the new parties acquired an interest in the purchase, nor is there exhibited with the bill any evidence of such interest.

On the 21st day of October, 1859, on motion of the complainant, the cause was referred to a commissioner, to state an account of the payments made by the defendants on said land, and on motion of defendants in the same order, special surveyors were appointed to go upon the land and survey the same, &c. The next order made in this cause, as the record shows, was made on the 15th day of April, 1869, which order recited the fact, that during the war the papers in the suit were lost or destroyed. The plaintiff was given leave to file a new bill, and the defendants had leave to demur to or answer the same, and then follows, "by consent of the parties, by their counsel, Thomas S. Robson, is appointed surveyor to execute the order of survey made in this cause, in lieu of Harvey Handley, who declines to act as surveyor." The said surveyor made his report in August, 1869, in which he ascertained, that there were forty thousand three hundred and seventy-two acres remaining in the tract.

On the 16th of October, 1869, the report of commissioner Harlow, which had been made in the cause, was committed

with the cause to James Withrow, who was appointed by the decree a special commissioner with directions to take such further evidence as the parties might offer, and to make such changes in the said report as the evidence might require. In his report, Commissioner Withrow adopts the report of Surveyor Robson, as to the number of acres remaining under the contract, and in accordance thereto, and says: "By this survey and report it appears, that the original amount in the survey was fifty-two thousand three hundred and sixteen acres and, that after deducting the reservations mentioned in contract 'A', the true amount sold by Hill to Maury and others was forty thousand three hundred and seventy-nine acres. This survey and report is recognized by the parties as correct, and it is agreed that this shall be the amount of land chargeable to Maury and others to be paid for according to contract 'A.' " This report shows, that there is due to Hill three hundred and ninety dollars and eighty-nine cents with interest from November 2, 1869. On the 18th day of October, 1870, on motion of plaintiff, the said report was re-committed to Commissioner Withrow, who made the same report as before, adding interest. On the 25th of November, 1871, the commissioner not having filed said last report, on motion of plaintiff, it was "ordered, that said commissioner receive and hear any further evidence, which may be laid before him by either party. But before he, the plaintiff, is to have the benefit of this order he is to pay the commissioner his costs."

The commissioner reports, "The following statement in addition to and in amendment of the former report made in the above named cause, is made at the request of counsel engaged in the cause. It appears from a paper now filed in the cause for the first time, that the proper time from which to calculate interest after the payment of the Monser and Milton debt was not fixed by your commissioner. After the above named debts were paid, the balance was to be paid in four annual installments, counting from the date of the contract, the 18th day of May, 1854. This balance was two thousand seven hundred and sixteen dollars and eighteen cents (see former report). This would give six hundred and seventy-nine dollars and four cents to be paid annually on

the 18th days of May, 1855, 1856, 1857 and 1858, and in the conduct of the account to follow they will be treated as bonds of these debts and the interest charged accordingly. This will materially alter the result." He then makes the statement on this basis and ascertains a balance due Hill of one thousand and ninety-nine dollars and ninety cents as of the 1st day of November, 1877.

On the 27th day of May, 1878, this report being unexcepted to was confirmed, and a decree entered, that said sum was a lien on said land and, that the administrator of John Hill, in whose name the cause had been revived, Hill's death being suggested, recover of Robert H. Maury, the said sum of money with interest and costs of suit, and if it was not paid within thirty days, a commissioner by said decree appointed, was ordered to sell said land to pay the same. The plaintiff filed a new bill, in which he alleged, that, R. H. Maury had purchased all the interest of his co-defendants. Hill and wife, filed a deed in the papers of the cause, which recites, that Maury had purchased the interest of his co-defendants, and this deed is recognized by the decree of May 27, 1878.

The defendant, Robert Maury, filed his petition in the cause, in which he set out the object, for which the suit was brought, the appointment of Surveyor Robson; that his survey was made in August, 1869; that he reported that the number of acres sold was forty thousand; that in October of the same year a commissioner reported the balance of the purchase-money due to be three hundred and ninety dollars and eighty-nine cents as of November 2, 1869; that this report was accepted as correct by all the parties and by their counsel, and so no order was made confirming it, probably because it had been agreed between petitioner and Hill, that the expense of the survey should be borne equally between them; that petitioner had paid it all, and that Hill's half exceeded the balance thus ascertained; that the cause so remained for seven or eight years without further proceedings, except that there seems to have been one or two unsuccessful attempts made by Hill to show, that what is known as the Manser debt, which petitioner had discharged, had not been properly calculated, but that so far as the balance due upon the sale itself was concerned, the report of the commis-

sioner was considered as full and final by all parties; that the matter thus remained until October, 1877, when the said Hill procured a supplemental report to be made by the commissioner, in which the interest was calculated upon a different basis, and by which he found the indebtedness to be one thousand and ninety-nine dollars and ninety cents with interest, instead of three hundred and ninety dollars as before reported; that this report was confirmed in May, 1878, by an order which directed, that unless the petitioner paid the said sum of money with interest from November, 1877, the special commissioner should sell the land to pay the same; that since the entry of said decree, petitioner had been paying said balance in installments and had reduced it to about seven hundred or eight hundred dollars.

He further states in said petition, that in 1871 he conveyed the land to trustees for certain purposes; that these trustees about a year before the filing of the petition, desiring to have a careful and accurate map prepared, employed M. F. Maury, a mining engineer and lawyer of eminence for the purpose; that he spent a great deal of time on the property, and has given his best care and attention to the work, availing himself of the most approved and accurate instruments, and petitioner is fully satisfied, that his calculation is correct; that the number of acres sold petitioner was thirty-five thousand six hundred and ninety-one instead of forty thousand three hundred and seventy-two, as reported by Robson, a difference of four thousand six hundred and eighty-one acres, which at the purchase-price of fifty cents per acre makes a difference of nearly two thousand five hundred dollars, and the purchase-money has been largely over paid; that as soon as petitioner first heard from Mr. Maury these facts, some four months prior to the filing of his petition, he at once notified Mr. Price, the commissioner, by advice of counsel, that he would not make any further payments, until it were shown, that Mr. Maury's calculations were wrong; that he proposed, that Maury and Robson should confer and compare their work and calculations, being satisfied that the latter would soon be convinced, that he had been in error; and that being very anxious to avoid litigation he offered, that no delay should occur in making payment, should he be found

in debt, as he would then pay it all at once; that petitioner wrote to Mr. Maury requesting him to confer with Robson at once; that Mr. Maury wrote to Mr. Robson several times but could get no answer; that several months had passed, and the commissioner had advertised the land for sale; that said decree of May, 1878, should be reviewed for two reasons: first, because it treats the whole balance found due as principal and directs, that the whole should bear interest from November, 1877, whereas only seven hundred and forty-three dollars and twenty-five cents should bear interest; second, because the discrepancy between the survey of Robson and that of Maury was of so serious a character and came to petitioner's knowledge only a few months before petition was filed; that while he had no personal acquaintance with Mr. Robson, yet knowing him to be the county surveyor and a sworn officer and believing him to be capable, he presumed that his work would be correctly done and had no reason to doubt, that it had been so done, until Mr. Maury, employed as aforesaid by others, detected his error; that the fact that Mr. Robson seems unwilling to revise his figures and calculations with Mr. Maury, confirms petitioner in his belief, that his work is not accurate, especially in view of the fact, that Mr. Maury was selected to do this work because of his known ability and accuracy and because of the peculiar facilities which he enjoyed for arriving at correct results in matters of this nature.

The prayer of the petition is, that said order of May, 1878, may be reviewed; that the account between the parties be restated in accordance with the quantity of land actually sold; that he may have a decree of restitution of the amount of purchase-money overpaid; and that the sale be enjoined until this can be done, &c. The petition was sworn to.

The court entered an order on the 14th day of January, 1880, restraining the sale. The defendants to the petition answered denying the material allegations therein.

The deposition of M. F. Maury was taken, in which he says, that he made a survey of the tract in 1878 and 1879; that by his survey he found, that the lines by which R. H. Maury bought from John Hill contained thirty-five thousand six hundred and ninety-one acres. He says: "I calculated

my work by latitude and departure, the only absolute and accurate method and rule that has the advantage of showing just what is the error of a survey." He also says: "Robson's report calls for the divide between Bell creek and Sycamore waters and Twenty Mile creek waters as the boundary of Mr. Maury. If I follow his calls, I often leave the top of the ridge entirely and get down on the streams. Hence I discarded his lines and followed the natural courses called for. The same remark is true of the lines on the divide between Middle creek waters and Sycamore and Leatherwood waters."

On the 1st day of June, 1880, the cause was heard on a motion to dissolve the injunction upon the petition of R. H. Maury, depositions of witnesses, report made by M. F. Maury of a survey made by him, exceptions thereto and exhibits filed and was argued by counsel, whereupon the court dissolved the injunction and dismissed the petition with costs. From this decree and also from the decree entered in the cause on the 27th day of May, 1878, the defendant Maury appealed.

Did the court err in dissolving the injunction and dismissing the petition? The petition is in the nature of a bill of review. It must show error upon the face of the decree or newly discovered evidence, which could not by reasonable diligence have been discovered before the decree. This bill does neither. As far as we can see, there is no error in the decree of May 27, 1878. The survey of Robson, it is insisted, shows error upon its face. We cannot perceive it. That report was made August 4, 1869. Commissioner Withrow in his report says, that it was agreed by the parties, that it showed the correct number of acres sold. Why the cause was permitted to sleep until 1878, when Commissioner Withrow's last report was made, based on Robson's report of the number of acres sold, which report was confirmed without exception, is not shown by the record. We can see no error in Robson's report; and for nine years the parties to the suit could see none. It is not pretended in the petition, that the alleged error in Robson's survey and report, shown, as it is claimed, by Maury's private survey, could not have been discovered by the use of ordinary diligence.

But it is urged, that there is error in the decree of May, 1878, because it is against Maury alone and not against his co-purchasers as well. Maury was in court all the time as well as his co-purchaser. The deed filed by Hill and wife recites the fact, that Maury had purchased the interests of the others. The decree recognizes this deed. The petition of Maury virtually admits, that he alone is interested; and while the decree is in form a personal decree, yet it orders the land sold to pay the balance, if not paid in thirty days. It is very evident, that forty thousand acres of land would far more than pay the debt, which was a lien upon it. Under these circumstances we do not think it was an error to the prejudice of Maury, that there was not a personal decree against his co-purchasers. Besides, if the record was all here, it might show, what seems to be virtually admitted by Maury, that he did own the whole land at that time.

It is further urged, that it was error not to make parties to the suit those persons, who had purchased the interest of Henry L. Brooke. A sufficient answer to this assignment of error is, that it does not appear that those persons had any interest in the land at the institution of the suit. The answer says, that they are *now*, at the time of filing the answer, interested; but from all that appears, they may have been purchasers *pendente lite*.

It is further insisted, that the decree should have required the execution of a proper deed to the purchaser. There was on file with the papers of the cause, as appears by the supplemental record, a proper deed executed by Hill and wife to R. H. Maury, which follows the requirements of the contract, except that it is made to Maury alone, of which he certainly cannot complain, and the other defendants have made no complaint.

It is also insisted, that the decree ought to have deducted from the purchase the one thousand acres on which the timber was reserved. This would have been manifest error prejudicial to Hill, as it would have violated his contract.

It is also urged, that the commissioner, who took the account, on which the decree was founded, was not then a commissioner or officer of the court. The answer to this is, that he had been appointed to take the account, that it was

recommitted to him, and that he made no report except under the direction of the court.

It is insisted, that manifest error was made in the calculation of the number of acres. It took Maury nine years to discover this *manifest* error, and he discovered it then, only upon a private survey, made by disregarding the lines or many of them, as run by Robson. As far as legitimately appears by the record, no error was committed by Robson in his calculation.

We see no error in either the decree of May 27, 1878, or of June 1, 1880. They are respectively affirmed with costs, and damages, according to law.

JUDGES HAYMOND AND GREEN CONCURRED.

DECREES AFFIRMED.

W H E E L I N G.

PITTSBURGH, WHEELING & KENTUCKY R. R. Co. v. APPEL-
GATE & SON.

Submitted June 3, 1880—Decided December 9, 1882.

(*SNYDER, JUDGE, Absent.)

1. Upon a motion for a change of venue counter affidavits may be read; and if the court is satisfied from all the affidavits or other evidence for and against the motion, that the venue ought to be changed, it will in the exercise of its discretion remove the case, otherwise it will not. The exercise of this discretion is of course reviewable by the Appellate Court. (p. 179.)
2. Where the name of an individual appears upon the stock-book of a corporation as a stockholder, the presumption is, that he is owner of the stock, appearing in his name; and such book is proper evidence to go to the jury to show, that he was a subscriber to the capital-stock of the corporation. (p. 180.)
3. A subscriber to the stock of a corporation can not escape his liability to pay his subscription, on the ground that he did not pay the sum required to be paid by the statute at the time he subscribed. (p. 183.)

*Cause submitted before Judge S. took his seat on the bench.

Writ of error and *supersedeas* to a judgment of the circuit court of the county of Brooke, rendered on the 20th day of March, 1879, in an action at law in said court then pending, wherein the Pittsburg, Wheeling and Kentucky Railroad Company was plaintiff, and Applegate & Son were defendants, allowed upon petition of said plaintiff.

Hon. Thayer Melvin, judge of the first judicial circuit, rendered the judgment complained of.

The facts of the case are fully stated in the opinion of the Court.

W. P. Hubbard for plaintiff in error cited the following authorities: Code ch. 128, sec. 1; 7 Ind. 110; 10 Ind. 182; 4 Cold. 214; 8 Leigh 364, 366; Hall's Dig. 622; 2 W. Va. 59; *Id.* 73; 3 Bla. Cs. Com. 383; 5 Otto 418; 26 Me. 191; 9 R. I. 513; Code Va. (1860) ch. 57, sec. 25; *Id.* sec. 6; 29 Conn. 148, 149; 24 Vt. 474, 475; 19 N. Y. 119; 26 Barb. 202; Thomp. Stockholders § § 162-170; 60 Me. 468; 5 Giel. 484; 36 Miss. 17; 6 Man. & G. (46 E. C. L.) 81, 133; Thomp. Stockholders § 107, note and cases there cited; 17 Ga. 574; 31 Tex. 465.

John J. Jacob for defendants in error cited the following authorities: 11 W. Va. 727; 1 Greenl. Ev. § 485; Code Va. (1860) ch. 57, § 25; 1 Caine's Cas. 86; 11 Johns. 98; 8 Serg. & R. 219; 13 Serg. & R. 256; 14 Serg. & R. 434; 12 Ired. 224; 8 Rich. 145; 21 Vt. 30; 16 Md. 422; 8 Conn. 483; 21 Wend. 211; 12 Ga. 170; 24 Md. 563.

JOHNSON, PRESIDENT, announced the opinion of the Court:

In 1873, the plaintiff brought its action of trespass on the case in *assumpsit*, in the circuit court of Brooke county, against the defendants. In the declaration filed is set out the incorporation of the company and the act of the Legislature of West Virginia incorporating the "Pan-Handle Railroad Company," as well as the act giving to the plaintiff all the rights of the said Pan-Handle Railroad Company, and alleging, that the defendants had subscribed for ten shares of the capital stock of the said Pan-Handle Railroad Company of the

par value of ten dollars per share and, that they paid thereon one dollar per share or ten dollars; that said Pan-Handle Railroad Company had at divers times demanded the payment of the residue of said subscription, which the defendants neglected and refused to pay; that the plaintiff, which had succeeded to all the rights and was subject to all the obligations of said Pan-Handle Railroad Company, had repeatedly after it had proceeded with the construction of said railroad, demanded of said defendants the payment of the balance of said subscription, which they had neglected and refused to pay to the plaintiff to the damage of plaintiff one thousand dollars, &c.

The defendants appeared and demurred to the declaration, which demurrer was overruled; and they then pleaded *non assumpsit*. The plaintiff, at the March term of said court, 1879, filed some nine affidavits as the foundation for a motion for a change of venue. The ground stated in the affidavits is, that predjudice existed against the plaintiff as to the subject of the suit in Brooke county, to such an extent, that it was impossible for it to have in that county a fair and impartial trial. The motion for a change of venue was resisted by the defendants, and they filed some twelve counter affidavits tending strongly to show, that there was no such general predjudice in said county against plaintiff as to the demand in said action and, that it could have a fair and impartial trial of the issue in said county.

On the 11th day of March, 1879, the court after considering said motion and the affidavits in support thereof together with the counter affidavits, overruled the motion for a change of venue, to which the plaintiff excepted.

On the 20th day of March, 1879, the issue was tried by a jury and a verdict rendered for the defendants. The plaintiff moved the court to set aside the verdict and grant it a new trial, which motion the court overruled, and entered judgment for defendants for their costs. In a bill of exceptions filed, all the evidence is certified. To the said judgment the plaintiff obtained a writ of error. The evidence as certified sets out the act of the Legislature of West Virginia incorporating the Pan-Handle Railroad Company, and the several acts amendatory thereto, the last of which is an act passed

February 16, 1871, which changed the name of the corporation to "The Pittsburgh, Wheeling and Kentucky Railroad Company," and among other things provided, "that all contracts and liabilities to or from said Pan-Handle Railroad Company shall be transferred to and rest in the said Pittsburgh, Wheeling and Kentucky Railroad Company, which shall succeed to all the rights and be responsible for all the obligations of the Pan-Handle Railroad Company." It further provided, that all suits then pending on behalf of the Pan-Handle Railroad Company, might be prosecuted without delay, by inserting the name of the new corporation in place of the old, and the case should be tried and decided as though no change had been made.

The plaintiff introduced in evidence the minute book of the plaintiff and read therefrom the proceedings of a stockholders' meeting held at Wellsburg, March 29, 1869, by which it appeared, that pursuant to a notice inserted for four successive weeks in the newspapers published in said county of Brooke, the meeting was held in the court house of Brooke county. They proceeded to elect a president and board of directors, &c. On the same day it appeared in evidence, that the board of directors had a meeting and A. Kuhn, was authorized to collect one dollar per share upon the capital stock subscribed. It also appeared from the proceedings of the board of directors at a meeting held on the 13th day of December, 1870, that a committee was appointed to collect the assessment of ten dollars per share, remaining unpaid, and an additional assessment of ten dollars per share was made. It appeared from the evidence of H. G. Lazear, that he was an original subscriber to the capital stock of the company; that he was present at the organization of the company in the court house of Brooke county, on the 29th of March, 1869; that the stockholders were generally present; but could not say whether the defendants were there, supposed they were, but could not say positively; was present at the meeting on December 13, 1870, when it was decided to collect the first call, so far as it was unpaid, and to proceed and collect the full sum of one dollar per share; was appointed agent to make collections, and as such agent collected one dollar per share from the defendants. This was

shortly after he was appointed agent. He told the defendants what his business was, and they paid him one dollar per share amounting to ten dollars. At that time the company were making preparations to open the road. He called on none except stockholders. They were mentioned to him as being stockholders, and they did not deny it; was present at a meeting in Wellsburg, in the court house, after the organization of the Pittsburgh, Wheeling and Kentucky Railroad Company, when the affairs of the company were under discussion; it was a kind of indignation meeting. Joseph Applegate was present and took an active part. The object of the meeting was to denounce the course pursued by the officers of the company. "Those in the meeting were rather going for the president, Mr. Lewis Applegate." He thinks this was in 1874, "some time after the road was broken down."

Joseph H. Pendleton testified, that some time subsequent to or about the time of the organization of the company, the original subscription papers in some way disappeared, and the company and the counsel for the company, have sought to find them but have not been able to do so. But they had a memoranda of the amounts taken on the books of the company. "The papers I say were but the original subscription lists, and I have seen them, and I have seen a subscription list with the name of Applegate & Son on. I can't say whether the names on these lists were copied on to other papers. I saw a book at the trial of Samuel George, with a list in it; never said I saw a list; I said I saw the subscription papers; I can say, that the paper on which I saw the name of Applegate & Son, was the original subscription paper, and the name of W. C. Barclay was on it for the same amount. I don't know, that Applegate & Son's name was on original subscription as I don't know his signature. I don't know anything about copied papers; never heard about copied papers until the other trial in court. I speak from original signatures." He further said, that "On the morning of the stockholders' meeting to organize, I assisted Mr. Kuhn to make out a list of subscribers, from which this little book was copied, and then the whole subscription list was copied. * * * Couldn't say whether they were written down just as they were called off or arranged alphabetically.

I called some of them from the original subscription papers. There might have been a part written in that book before I began." Mr. Lewis Applegate testified: "I wasn't president then, but the subscription papers were left here by the direction of the secretary, and whatever became of them I never could know. I found the subscriptions all entered on a little book, when I came in; the names and amounts. I searched for the subscription papers. There was a search made in all the papers of the railroad company, but they couldn't be found. There have been a good many enquiries after the papers. Nobody could tell where they went after the road got into operation."

Mr. J. H. Pendleton being recalled, testified: "The time I saw the papers in the possession of Mr. Kuhn, was on the morning of the meeting for organization. The last time I remember seeing them in his possession, was when the list was made out in a little book. I can't say I didn't see them afterwards, but I have no recollection of so doing." After other testimony was introduced, J. H. Pendleton was again recalled and was handed a book and asked what it was? He replied: "This is a book that I received from Mr. Lewis Applegate, the president of the company, purporting to contain a list of the stockholders of the P. W. & Ky. R. R. Co. It is a list of the stockholders, with the amounts of stock. It belongs to the company." Plaintiff thereupon offered the book in evidence, to which the defendants objected and the court sustained the objection and refused to admit the book in evidence, to which action of the court the plaintiff excepted.

C. D. Hubbard testified, that he was then president of the company and had been a director since 1872. Did not know positively at what time a regular set of books were opened by the company, except from the books themselves. Did not keep the books. Book shown witness he said was the ledger of the company; it contains the stock accounts of the stockholders, "or what he claimed to be such." "There is no other book, to my knowledge, containing such account. The first entry in the book is dated May 31, 1872. Curran Mendel was then secretary. Jas. Campbell succeeded him July 18, 1872. This book has been by the corporation regarded

and acted on as the ledger of the company. It is in the handwriting of James Campbell." Thereupon plaintiff offered the said ledger in evidence, to which the defendants objected and the court sustained the objection and refused to allow the said book to go in evidence, whereupon the plaintiff again excepted.

Plaintiff then offered the account of the said Applegate & Son, as stockholders in the plaintiff's company, as such account appeared in such ledger, to the admission of which the defendants objected, and the court sustained the objection and refused to permit the said account to go in evidence, and the plaintiff again excepted.

The plaintiff then proved, that a notice had been duly published, that at a certain time books for receiving subscription to the capital stock of the Pan-Handle Railroad Company had been opened, and that afterwards, at a meeting of the stockholders held as aforesaid on the 29th day of March, 1869, a majority of the commissioners stated, that twenty thousand dollars or more of stock had been subscribed, and submitted a list of the persons, who had subscribed stock, which was publicly read. It appears by the charter of the Pan-Handle Railroad Company that they could not organize until at least twenty thousand dollars had been subscribed. To the introduction of which evidence, the defendants objected, and the court sustained the objection and refused to permit the same to go to the jury; and the plaintiff again excepted. After the evidence had all been introduced by the plaintiff, the defendants moved to exclude the plaintiff's evidence on the following grounds: First, that there was no such public notice of the opening of the subscription books as is required by the statute. Second, that there is no proof that the ten dollars per share required by the statute to be paid at the time of the subscription, was in fact paid, but on the contrary there is proof in the record that it was not paid. Third, there is no proof that the twenty thousand dollars of capital stock, as required by the second section of the Act of July 15, 1868, was subscribed before the company was organized. Fourth, that there was no proof of the incorporation of the company. And the court sustained the motion and excluded the evidence, and the plaintiff again excepted.

The first error assigned is, that the court refused to change the venue, and counsel for plaintiff in error insists, that upon the motion to change the venue, counter affidavits were not admissible. That if the plaintiff by its own affidavits showed ground for such change, it was the duty of the court to order the change without reading affidavits in opposition to the motion.

Sec. 1 of chap. 128 of the Code provides, that "on motion of any party to a suit in a circuit court, the said court may for *good cause shown* order it to be removed to any other circuit court." There must then exist good cause for such removal, and such cause must be shown to the satisfaction of the court. The court exercises a discretion in this, as it does on the motion for a continuance of the cause. If good cause is not shown, then the court will not remove the case. And in ascertaining whether, there was such good cause, it seems to us, that it would be strange indeed if the other side were not allowed to show, that no such cause existed. The party making the motion might file his own affidavit, and in it show the best of reasons why the venue should be changed, and according to the position here assumed by counsel for plaintiff in error the court could not read in opposition to the motion affidavit that would clearly show, that there was absolutely no such reason as appeared in the affidavit, and the court would be bound to remove the cause at the mere caprice of one of the parties to the great inconvenience and expense of the other. Counter affidavits may be filed, and where the court has read all the affidavits *pro* and *con*, if it is satisfied that good cause for such removal has been shown, it ought to order a removal of the case; but not otherwise.

Upon a motion for a continuance this Court has held, that affidavits in opposition thereto may be read. *State v. Betts* 11 W. Va. 727. But it is also insisted, that if all the affidavits filed in this case for and against the motion were read, the motion ought to have prevailed. We have read all the affidavits, and we do not think good grounds were shown for a change of venue in this case. The court properly overruled the motion. The next error assigned is, the refusal to admit in evidence the book produced by the witness, Pendleton, purporting to contain a list of the stockholders of

the corporation. It was proved, that this was one of the books of the company, as it was also proved, that the ledger was one of the books of the company but, that the first entry was made in the ledger on the 31st day of May, 1872, more than three years after the organization of the company.

Section 25 of chapter 57 of the Code of 1860, which is referred to by and made a part of the charter of the company, provides, that "A person in whose name shares of stock stand on the books of the company, shall be deemed the owner thereof as it regards the company." And section 26 of the same chapter provides, that "The president and directors shall issue to each person appearing on the books of the company as owner of any shares of stock fully paid on, a certificate for such shares under the seal of the company, signed by the president, and countersigned by the secretary or cashier."

In *Turnbull v. Payson*, 5 Otto 421 it was held, that "where the name of an individual appears on the stock book of a corporation as a stockholder, the *prima facie* presumption is, that he is the owner of the stock in a case where there is nothing to refute that presumption; and in an action against him as a stockholder the burden of proving that he is not a stockholder or of rebutting that presumption, is cast upon the defendant. A number of authorities are cited by Mr. Justice Clifford to sustain this position. The book and ledger should have been permitted to go in evidence as tending to show, that the defendants had subscribed for stock and that they were stockholders. The presumption that would be thus raised, of course might be rebutted by them, if in their power to do so. As to the refusal of the court to admit the declaration of the commissioners at the meeting called for the organization of the company, that a majority of them stated that the necessary twenty thousand dollars of stock had been subscribed, the court did not err in excluding it, because in an action of this kind the evidence was wholly irrelevant. Such evidence, as well as any evidence tending to show, that the company was not legally organized, would be both relevant and material, in a *quo warranto* proceeding to annul the charter; but such evidence is neither relevant nor material in an action by the company against a subscriber of stock to

require him to pay such subscription. 5 Litt. 45; 9 B. Monroe 71; *Wight v. Shelby Railroad Co.*, 16 B. Mon. 7.

Did the court err in excluding the evidence from the jury? This involves the question whether or not the jury, on the evidence before them, would have been warranted in finding for the plaintiff? The grounds for excluding the evidence were first, that there was no such public notice of the opening of subscription books as is required by the statute. Second, That there was no proof that twenty thousand dollars of the capital stock was subscribed. There is nothing in either of these grounds, upon which a stockholder in a contest as to whether he should pay his subscription or not, could rely. These are grounds that affect the public, and the public only, in a proper proceeding, could urge them. Third, That there was no proof of the incorporation. It is strange that this point should have been made in the face of the charter, which is in the bill of exceptions. Fourth, That there is no proof, that the two dollars per share required to be paid at the time of the subscription was paid; but the record affirmatively shows, that it was not paid.

It is insisted, that where the statute requires a part of the subscription to be paid down at the time, and this is not done, the corporation cannot recover the amount of such subscription from the person so subscribing, and a number of authorities are cited, which fully sustain the position. *Union Turnp. Co. v. Jenkins*, 1 Caine's Cas. 381; *Highland T. Co. v. McKean*, 11 Johns. 98; *Hibernia T. Co. v. Henderson*, 8 S. & R. 219; *Ogle v. Sommerset T. Co.*, 13 S. & R. 256; *Leighty v. Susquehanna Co.*, 14 S. & R. 484; *McRea v. Russell*, 12 Ired. 224; *Greenville R. Co. v. Woodsides*, 5 Rich. 145; *Vermont C. R. R. v. Claves*, 21 Vt. 30; *Malby v. N. W. Va. R. R.*, 16 Md. 422; *Starr v. Scott*, 8 Conn. 483; *Crocker v. Craine*, 21 Wend. 211; *Napier v. Poe*, 12 Ga. 170; *Taggart v. Western R. R. Co.*, 24 Md. 563.

The theory upon which it is held, that the company cannot recover from the subscribers in such cases is, that the cash payment not having been made, the subscription is void; that it is a *nudum pactum*; that there is no mutuality, because it is claimed, that the company would not be bound to deliver the certificate of stock on a subsequent tender of

the money. But the cases in our opinion have no solid foundation on which to rest. It is for the benefit of the public, that the statute requires the cash-payment to be made; it is required to insure good faith and to avoid shams in those enterprises that so vitally affect the public. But, as between the corporation and the subscribers to the stock, the contract is made at the time of the subscription, and this is a sufficient consideration to support the contract. As is well said by Mr. Thompson, in his work on "Liability of Stockholders" section 107: "A subscription will operate just as effectively to deceive the public into subscribing for other shares or giving credit to the corporation, whether the statutory earnest-money is paid or not. * * * And it seems now firmly settled, that a person cannot discharge himself of the responsibilities of a stockholder, by showing that he never paid the deposit or first installment required of every subscriber. By the articles of association, the deed of settlement or the general law, a person will not be thus permitted to take advantage of his own default, to the prejudice of others." This position is well sustained by authority; and it will be seen, that the New York courts have changed their rulings on this subject. *Chesley v. Pierce*, 32 N. H. 402; *Piscataqua Ferry Co. v. Jones*, 39 N. H. 491; *Beach v. Smith*, 28 Barb. 254; *Black River, &c., v. Clarke*, 25 N. Y. 208; *Haywood Plank Road Co. v. Bryan*, 6 Jones L. 82; *Hall v. Selma, &c.*, 6 Ala. 741; *Smith v. Plank Road Co.*, 30 Ala. 650; *Thorpe v. Woodhull*, 1 Sandf. Ch. 411; *Wight v. Shelby R. Co.*, 16 B. Mon. 4; *Mitchell v. The Rome Railroad*, 17 Ga. 574; *Blair v. Rutherford*, 31 Texas 465.

It seems to me to hold, that the stockholder is exempt from liability because he received indulgence from the corporation; is to permit him to take advantage of his own wrong. He has, by his subscription, induced others to take stock and then, when the road is built and in operation and he thinks it is not a good investment, he will take the advantage of the road, which others built and which he encouraged them to build by subscribing to the enterprise himself, and escaped all obligations by pleading his own default. This would permit him to do the very thing as an individual, that the law requiring the cash payment to be made at the time

of the subscription which was enacted for the public good, was designed to prevent. Both reason and the better authorities, are in favor of the rule we here adopt; that a subscriber to stock of a corporation, cannot escape his liability to pay his subscription on the ground, that he did not pay the required sum at the time he subscribed.

It was shown, by the evidence, and it is uncontradicted, that these defendants upon being approached for a payment on their stock, for which it was alleged they had subscribed, paid without question thereon the amount at that time called, to-wit ten dollars or one dollar per share. With this evidence, if the jury had been permitted to pass upon it, and had found for the plaintiff the whole unpaid balance of the alleged subscription, on well established principles, we certainly would not have disturbed the verdict. The court erred in excluding the evidence.

The judgment of the circuit court is reversed with costs to the plaintiff in error; and the verdict of the jury is set aside and a new trial is granted; and this case is remanded for a new trial to be had thereon according to the principles of this opinion, and further according to law.

JUDGES HAYMOND AND GREEN CONCURRED.

JUDGMENT REVERSED. CASE REMANDED.

WHEELING.

LYTLE AND SUTTON, GUARDIAN, v. COZAD *et al.*

Submitted January 25, 1881—Decided December 9, 1882.

(*SNYDER, JUDGE, Absent.)

1. A court of equity has jurisdiction to grant relief on a lost bond, but it generally requires an affidavit of the loss of the bond to accompany the bill. If the plaintiff fails to file such an affidavit, it may be supplied by filing it at any time before the hearing; and if this be done, the relief will be granted, if the proofs in the case establish the loss of the bond.

2. The relief will be granted in such a case, though it be proven, that

*Cause submitted before Judge S. took his seat upon the bench.

21	183
35	172
35	656
21	183
37	676
21	183
38	741
21	183
41	367
21	183
64	885
21	183
40	48
21	183
164	86
164	87
65	782

after the institution of the suit, but before the hearing of the case, the lost bond was found, provided the plaintiff had used diligence to find it before the suit was brought; and especially when the loss of it arose from its having been improperly in the possession of one of the obligors.

3. When a court of equity has jurisdiction of the case independently of the loss of the bond, no affidavit need be filed of its loss.
4. A bond of a special commissioner to make a sale in a chancery cause is delivered by the commissioner to the clerk of the court, and on its face it appears to be a complete and perfect bond, which was executed by the sureties upon the condition that it should not be delivered to the clerk, till it was also executed by another person as surety, and when the clerk received the bond he was not informed of any such condition or of its being in any way conditioned. **HELD :**
This is a valid bond; and the sureties cannot set up as a defense, when sued on it, this condition.
5. It is not necessary to the validity of such a bond, that it should be either acknowledged or proven before the clerk.
6. Such a bond must, as to the sufficiency of the sureties, be approved by the clerk, but in order to make the bond valid, he need not endorse his approval upon it. This approval is sufficiently shown by the fact, that the bond had been properly filed away by the clerk, and by the commissioner of sale proceeding to collect the money, which the giving of such bond authorized him to collect.
7. If a creditor agrees to give further time to his debtor on his giving a new bond with security, and he does give such new bond, but the name of the surety on it is a forgery, the creditor may sue the principal and his sureties at once on the old bond, and therefore they are not released by such an arrangement attempted to be made without his knowledge.

Appeal from and *supersedeas* to a decree of the circuit court of the county of Lewis, rendered on the 6th day of March, 1878, in a cause in said court then pending, wherein John S. Lytle and John Sutton, guardian of William Sutton, were plaintiffs, and George Cozad and others were defendants, allowed upon the petition of said Cozad.

Hon. John Brannon, judge of the sixth judicial circuit, rendered the decree appealed from.

GREEN, JUDGE, furnishes the following statement of the case :

John S. Lyttle and John Sutton, guardian of William Sutton, instituted their suit in chancery in the circuit court of Lewis county, against George Cozad, Jonathan M. Bennett, John C. Jackson, Washington A. Bott, John C. Marsh and George Cozad, and at January rules 1874, filed their bill. In it they allege, that in the suit in said court of *Nathan Reger v. John S. Lyttle et al.*, a decree was rendered May 9, 1870, directing a sale of one hundred and ten acres of land, the property of John S. Lyttle, and appointing George Cozad commissioner of sale; that on July 5, 1870, he sold said land and Washington A. Bott purchased it for one thousand three hundred and eighty-five dollars, and executed for the purchase-money three bonds, of four hundred and sixty-one dollars and sixty-six and two thirds cents each to said Cozad as commissioner, with said John C. Marsh his surety, dated July 5, 1870, payable in six, twelve and eighteen months after date with interest from date; that the sale was confirmed by the court the next day, and that the decree confirming said sale directed that the said George Cozad, commissioner, as soon as he should execute before the clerk of said court, to be filed with the papers of the cause, a bond with good security in the penalty of two thousand eight hundred dollars to be approved by said clerk and conditioned according to law, should withdraw said bonds and collect the same, and after allowing him thirty-six dollars and seventy cents as commissioner and the printer's fees of fifteen dollars, it further directed, that the balance, after paying the costs of suit and the amount due the plaintiff in said suit, Nathan Reger, should be paid to said John S. Lyttle, and ordered him to make a deed to the purchaser, W. A. Bott. Copies of these decrees were filed with the bill.

On October 7, 1870, George Cozad with said Jonathan M. Bennett and John C. Jackson, his sureties, executed the bond required by said decree, which was approved and accepted by said clerk and was filed among the papers of said cause. The bill alleges the loss or destruction of said papers and bond. A deed was executed by the commissioner to the purchaser filed with the bill, which recites the bonds executed to the commissioner; a lien being reserved for their payment. The bill alleges, that the commissioner Cozad, did

withdraw and collect these bonds, and did pay the plaintiff, Reger, his debt and the costs of the suit as required by said decree, but after deducting his commissions, thirty-six dollars and seventy cents and said printer's costs, fifteen dollars, there still remained in his hands as commissioner a large amount, which by the said decree, he was directed to pay to John S. Lyttle, the plaintiff. Yet he never paid him any part of said balance, except ninety dollars which was paid February 20, 1872. The plaintiff, Lyttle, then states that this balance is, according to the amounts stated in the bill, about six hundred and thirty-one dollars as of the date of the sale, which has never been paid to him. The bill further states, that Jonathan M. Bennett claims that he signed and sealed said bond with the understanding and condition, that it should be binding on him only in the event one George Lawson should become a co-obligor therein; and the bond not having been signed by him, it was not completed and is therefore not binding on the said defendant. But the plaintiffs claim, that it was executed and was delivered to a public officer, the clerk, without such condition, and that it is binding on Bennett.

The plaintiffs also charge, that there was placed in the hands of Jonathan M. Bennett, by said George Cozad, or by others in his behalf, a sum of money amply sufficient to pay the full amount due to the said John S. Lyttle under said decree, which money was derived from the sale of property owned by said Cozad and was placed in the hands of said Bennett for the express purpose of paying off the money so decreed to be paid to said Lyttle; and that this money is yet in the hands of said Bennett, and the plaintiffs claim, that this is a trust fund in the hands of said Bennett, which this Court should order to be applied to the payment of said debt due the plaintiff John S. Lyttle.

The obligors in the said bonds given for the sale of said land, Bott and his surety Marsh, are made defendants because if the court should hold as claimed by Bennett, that the official bond given by said Commissioner Cozad is invalid, then the payment of said bonds to him was unauthorized. And the plaintiffs claim they are still liable on these bonds as well as the land on this vendor's lien. The plaintiff John L. Lyttle,

the bill states, has assigned his right to said money to this co-plaintiff John Sutton, as guardian of William Sutton. The bill prays a decree against these sureties, Bennett and Jackson, on their official bond of Commissioner Cozad; or if this bond be not binding, then that the tract of land bought by said Bott be declared liable for said claim and be subjected to pay the same, and, that said Bott and his surety Marsh, be held personally liable therefor; that said bond in the hands of Bennett may be acted upon and applied and disposed of according to equity; that the plaintiffs' rights may be settled and the liabilities fixed between all parties, and that all parties may have relief according to equity. And the bill further prays for general relief.

John M. Bennett filed his answer, in which he admits the facts stated in the bill in reference to the proceedings in said suit of *Reger v. Lyttle*, but denies that he executed a bond as security of said commissioner, and as co-security with John C. Jackson for the faithful performance of his duties, by said Cozad commissioner. He says this bond was brought to his office in Weston, by George Cozad, who told him that George Lawson and John C. Jackson would sign it, and Bennett signed his name with the understanding and agreement, that when Lawson came to town and signed it, that the securities would acknowledge the bond before the clerk at his office. Lawson did not execute the bond and Bennett insists that it is not binding upon him. He believes, that when he signed the bond it was entirely blank.

The answer alleges, that he Bennett, and not Cozad, paid Reger his money. He paid it, because he had in the first instance received this claim of Reger to collect as his counsel. He insists, that Cozad paid to the plaintiff, John S. Lyttle, the entire balance of his claim and took his receipt therefor, and afterwards Cozad borrowed said balance, amounting to about three hundred and fifty dollars of him and gave him his note therefor, bearing ten per cent. interest, with John C. Jackson as his surety, which note by the assignment of the plaintiff Lyttle, the co-plaintiff Sutton now has. He denies, that either Cozad or any person for him ever placed any money in his hands to pay on this decree, and, that he has no such money in his hands, for the decree was regarded

as having been entirely satisfied. He says, that he bought of George Cozad's wife one hundred and eleven acres of land in Upshur county, for which he paid two hundred and fifty dollars in cash, and that three hundred and fifty dollars remained in his hands, of the purchase-money, to pay off said note given by Cozad and Jackson to Lyttle, for the three hundred and fifty dollars borrowed, which was to be done when the note was delivered to Cozad and his wife, but not otherwise. This money was her sole and separate property arising from the sale of her land inherited by her from her father, and if this note was not delivered to Cozad or his wife, then this balance of the purchase-money was to be paid to her, and she being now dead, it now belongs to her children, who must be made parties, before the court can assume jurisdiction over this money. He also denies, that the papers were lost, and as no affidavit of loss has been filed with the bill, no jurisdiction can attach on that account; he insists that the jurisdiction in this case does not belong to a court of equity, but to a common law court, and on this ground he demurs to the bill. This answer was filed March, 1874.

John C. Jackson, at the same time filed his answer. He says, that he signed this bond subsequently to Bennett, and without any idea that any sort of conditions were attached to it when he signed it. He says, that the papers in this cause of *Reger v. Lyttle*, were found in the office of Cozad some time after the institution of this suit; that this one hundred and eleven acres of land in Upshur county, named in his answer, were sold to Bennett by Cozad and his wife, and six hundred dollars of the purchase-money was left in Bennett's hands to pay the plaintiffs' debts and, that it should be so applied; that his, Jackson's name, was forged by Cozad to the bond of three hundred and fifty dollars given to Sutton, and being indicted therefor, he has fled the State, and said bond is now in the hands of the commonwealth's attorney as evidence, and cannot be delivered up to Cozad or his wife; that the condition on which this three hundred and fifty dollars was to be paid over by Bennett should be considered void. He insists, that as this money is in Bennett's hands, he is liable therefor as principal; and if there was a sufficient

amount in his hands to pay the whole of the plaintiffs' demand, that he should be decreed to pay all the costs of this suit. On September 8, 1874, the plaintiffs' attorney made and filed an affidavit of the loss of this bond, signed by the commissioner of sale, as set out in the bill. A number of depositions were taken, which prove that this bond, which is in the usual form of bonds given by commissioners of sale, was prepared by the deputy clerk and handed to George Cozad, the commissioner of sale, to have executed. Bennett testifies, that when Cozad brought the bond to his office in Weston, the names of the obligors were not inserted in the bond, and that Cozad asked him to sign it. He did so with the understanding, that John C. Jackson and George Lawson should sign it, and as soon as George Lawson came to town all the parties would acknowledge it before the clerk of the court. He alleges, that Cozad's name was not then signed to the bond. John C. Jackson states, that he thinks that Bennett's name was signed to this bond when he, Jackson, signed it. He never heard of Bennett's signature being put to this bond on any conditions of any sort, until after Cozad left this county some eighteen months after this bond was given.

The clerk states, that the deputy clerk to whom this bond was returned by Cozad signed at first only with the names of Cozad and Bennett, presented this bond to him and he objected to it, unless the name of another responsible party was signed to it. He afterwards presented the bond with the name of Bennett also signed to it, and he was then satisfied with it and directed it to be filed with the papers of the suit, which was done.

The bond is dated October 7, 1870, and was signed and sealed by the parties. The order of the signatures are first, George Cozad, John C. Jackson and lastly, J. M. Bennett. This would seem to indicate, that the clerk's recollection that the bond was signed by Cozad and Jackson before it was presented to or signed by Bennett, was correct. The clerk also states, that he was admonished by the judge to take good security on this bond, and that he went to Bennett's office to see if the bond was all right, but he was not in. Afterwards Bennett came to his office, and he asked

him if it was all right, and that Bennett assented to its being right by a grunt. The clerk did not show the bond then, and nothing was said about its having been signed conditionally by Bennett, or about any expectation on his part that it would be signed by George Lawson. Nor did Cozad or any one else speak of any expectation, that George Lawson or any other person was to sign this bond.

The deputy clerk testifies to the same effect and states further, that he never heard that Bennett claimed to have signed the bond with any qualification or condition till after this suit was brought. It was proven, that the papers in the suit of *Reger v. Lyttle*, in which this bond was filed, were absent from the clerk's office for a long time before this suit was brought and could not be found, though diligently searched for. Some time after the institution of this suit they were found in the office of Cozad, who had left the country some two years before.

Bennett states in his deposition, that a prior bond had been given by Cozad, which was deemed insufficient by reason of misrecital. But in this he is not confirmed by the clerk, who has no recollection of any other bond having been drawn in this case; nor does the deputy clerk speak of any other bond. They would be more likely to recollect correctly, whether such other bond was ever drawn. Bott, the purchaser of the land states, that he paid to Cozad, the commissioner, the whole of the purchase-money for the land he bought, amounting to one thousand three hundred and eighty-five dollars, which was divided into three payments of four hundred and sixty-one dollars and sixty-six and two third cents each; and that he "paid off the first payment before it was due, and the other two as they fell due; he thought, but was not certain, that the first note was paid shortly after it was given."

These notes the record shows were all dated the 5th day of July, 1870, and were payable in six, twelve and eighteen months from date, with interest from date, though the decree ordering the sale did not direct, that the deferred payments should bear interest from their date, but only that the sale should be on a credit of six, twelve and eighteen months. The first note fell due January 5, 1871, and the commissioner's

bond was executed on October 7, 1870. John Sutton, the assignee of John S. Lyttle's claim, was paid two hundred and ten dollars on January 10, 1872, and on the 20th of February, 1872, he was paid by check ninety dollars more, making in all three hundred dollars. After these payments there was still due him three hundred and fifty-six dollars, and he says, that Cozad told him he could not raise it, but if he Sutton, would loan it to him he would pay him ten per cent. per annum and give him the best security, and said that when J. M. Jackson returned from Baltimore he would get him to sign his bond as security for that amount to Sutton, and send it to him by mail, and he did receive by mail a note purporting to be signed by Cozad and Jackson, but it turned out Jackson's name was forged, he testifying in this case that Cozad was indebted for this property and left the country in the spring of 1872, and this forged note was placed as evidence against him in the hands of the commonwealth's attorney, who will not give it up.

Bennett in his deposition states, that after he left here January 1, 1872, he purchased from Cozad's wife, Columbia Cozad, one hundred and eleven acres of land in Upshur county, West Virginia, and out of the purchase-money retained three hundred and fifty dollars to pay this note claimed to be forged, when the same should be delivered to her. He also asserts, that this land was her sole and separate property. As the note could not be delivered up, he was not authorized to pay the amount of it and never did.

The circuit court on July 27, 1875, on this pleading and evidence, expressed the opinion, "that the bond mentioned in the bill executed by George Cozad, special commissioner, with John M. Bennett and John C. Jackson as his securities, is valid and binding both as against said Cozad and said Bennett and Jackson as securities;" and referred the cause to a commissioner to ascertain and report, what balance remains due to the plaintiff out of the proceeds of the sale of the land in the case of *Nathan Reger v. John S. Lyttle et als.*; whether any other bond than this mentioned in the bill was executed by George Cozad as commissioner, and if so, when it was executed and who were the obligors in it; and whether any of the purchase-money of said land, was recovered by

George Cozad before the execution of the bond in the bill mentioned, and if so, what amount.

On January 27, 1877, the commissioner made his report, in which he charges all the purchase-money bonds for this land as bearing interest from that date, July 5, 1870, and deducting the debt paid Reger and all costs of suit, he shows a balance in the hands of Cozad, commissioner, as due to the plaintiff of five hundred and sixty-seven dollars and ninety-nine cents as of January 25, 1877. He further, reports, that he has been unable to ascertain that any other bond than that mentioned in the bill was ever executed by George Cozad, as commissioner, and it does not appear from anything before him, whether or not the first purchase-money bond of Washington A. Bott was paid before or after the execution of the commissioner's bond named in the bill dated October 7, 1870. The other two bonds were paid afterwards.

The commissioner then makes a special statement, at the instance of Wm. Bennett, based on the assumption, that this first purchase-money bond was paid before October 7, 1870, and therefore could not be charged against the sureties of Cozad. According to this statement, if we assume that the bonds did not bear interest from their date, as they professed to do, because the decree directed the sale of the land simply on a credit of six, twelve and eighteen months without saying, that the purchase-money should bear interest from the day of sale, the amount paid out by Cozad, excluding this first bond, would exceed the amount he had received by one hundred and thirty-three dollars and eighty-six cents as of January 25, 1877. Or if we charge interest on these bonds from their date, the amount Cozad had received would exceed the amount he had paid him by sixty-four dollars and thirty cents; the first purchase-money bond not being charged. He also has a statement showing how the liability between himself and his co-security would be, if the plaintiff's claim was three hundred and fifty-six dollars; and he makes it out that Bennett would have to pay forty-eight dollars and one cent, and J. C. Jackson three hundred and seven dollars and ninety-eight cents. This special statement is excepted to by the plaintiff's counsel on the points, in

which it differs from the commissioner's statements, specifying them.

In the mean time Mrs. Columbia Cozad died, and her estate was committed to J. G. Vandervoot, sheriff of Lewis county. She left two infant children, Susan and Minnie Cozad, and in August, 1877, the plaintiff filed an amended bill repeating his allegations made in his original bill in reference to the fund left in Bennett's hands to pay the plaintiff's claims; and alleging, that Columbia Cozad was the owner in fee of the one hundred and eleven acres of land bought of her and her husband by J. M. Bennett; that she married prior to April 1, 1869, and thereby her husband, George Cozad, became entitled to an estate for life in said tract of land; that of this purchase-money that J. M. Bennett owed for the purchase of this land of Cozad and wife, he retained three hundred and fifty dollars in his hands to pay the claim of the plaintiffs; that by this sale the character of this property was changed from realty to personalty, and the cash payment of two hundred and fifty dollars was paid to Cozad's wife and, that she consented and directed that the residue of the purchase-money amounting to three hundred and fifty dollars, should be left in Bennett's hands to be paid on the plaintiff's claim in order to relieve him from his distress and trouble, not only because of owing this debt, but, also because of the criminal prosecution against him which had grown out of it.

In the amended bill it is stated, that this sale was made for that express purpose; that this change in the character of this property gave to George Cozad the right to this three hundred and fifty dollars as personalty, and it is held in trust by Bennett to pay the plaintiff's demand; that the condition spoken of by Bennett of the delivering up of this note claimed to be forged, was really no condition but a mere request, and if it were otherwise such a condition is void. The administrator and the children of Columbia Cozad are made, with the other defendants to the original bill, defendants in this amended bill, and general relief is asked.

The answer of the infants by their guardian *ad litem* was filed, and Cozad and Bennett filed a joint answer. This answer claimed, that this one hundred and eleven acres of

land was the sole and separate property of Columbia Cozad, but does not deny that she was the owner of it at the time of her marriage, nor that it was not prior to April 1, 1869. It is silent, as to how she was the owner of this land to her sole and separate use, and makes no denial of the allegations of facts, which, it is claimed, show, that she was not the owner of this land to her sole and separate use, unless the denial at the close of the answer could be so construed, which is, that the defendants deny every allegation in the bill inconsistent with this answer and admit all those consistent with it. They claim, that this money of Columbia Cozad not being available for the relief of her husband now remains in Bennett's hands as the property of her children and heirs.

On March 6, 1878, this cause was heard on these pleadings and proofs, the replications to the answer, the depositions and report of the commissioner and the record in the case of *Nathan Reger v. John S. Lyttle et als.*, including the bond in said cause referred to in the bill in this cause; and the court confirmed the report of the commissioner, and the plaintiff's exceptions to the commissioner's special statement, made for Bennett, were sustained. And it was decreed that George Cozad, J. M. Bennett and John C. Jackson, do pay to John Sutton, guardian of William Sutton, the sum of five hundred and ninety-seven dollars and fifty-nine cents, with interest from March 6, 1878, being the amount found due by said commissioner's report, and the costs of this suit for the collection of which said Sutton may sue out execution. No decree was rendered touching the payments made by Bennett to Reger, proved by his deposition, as between him and his co-security Jackson, as there may be a fund in said Bennett's hands arising from the sale of Mrs. Cozad's land, in which George Cozad may have a life estate. By the decree all the rights and equities between Bennett and Jackson are reserved to them. From this decree J. M. Bennett obtained an appeal and *supersedeas* to this Court.

J. M. Bennett, counsel for appellant, cites the following authorities: 1 Story Eq. 104; Code 617, 747; 7 Pet. 448; 5 Pet. 373; 1 How. 250; 17 How. 437; 2 McL. 405; 18 Gratt. 801; 16 Wall. 1; 2 McL. 74; *Id.* 99; 3 McL. 376;

4 McL. 496; 4 Cr. C. C. 293; 5 Cr. C. C. 123; Adams Eq. 439, 447; 2 Call. 537; 2 Rand. 449; 2 Leigh 490; 7 Leigh 402; 9 Cr. C. C. 212; 5 Gratt. 384; 2 Rob. Pr. 132, 141; 3 Call. 74.

Henry Brannon, for appellees, cited the following authorities: 18 Gratt. 801; 12 Leigh 479; 27 Gratt. 403; 4 W. Va. 45; 6 W. Va. 123; 24 Gratt. 202; 16 Wall. 1; 21 Am. Rep. 440-463; Big. Estopp. 437; *Id.* 452, 453, note 1; *Id.* 487, note 1; *Id.* 489; 27 Gratt. 608; 3 Gratt. 138; 2 Tucker s p. 483; 2 Rand. 323; 17 How. 437; 11 W. Va. 386; 12 W. Va. 226; 6 Munf. 202; 7 Leigh 128.

GREEN, JUDGE, announced the opinion of the Court:

The first question presented by this record is, whether the circuit court ought not to have dismissed the bill, because of the want of jurisdiction on the part of a court of equity in the case; there being no affidavit accompanying the bill, of the loss of the bond of the commissioner of sale, which bond the plaintiffs sought in this suit to enforce. The bill was not verified by affidavit, nor was any affidavit filed with the bill of the fact of the bond having been lost. The bill was filed at January rules, 1874. On March 5, 1874, J. M. Bennett filed his answer, in which he insists, that the plaintiffs' remedy is at law, and objected to the jurisdiction of a court of equity in the case, because no affidavit was filed with bill of loss of this bond. On September 8, 1874, the plaintiffs' attorney filed his affidavit stating, that this bond was lost when this suit was instituted, and could not then be found on diligent search, though it was found some time afterwards where it had been improperly placed by one of the obligors in the bond. The first hearing of the case did not take place till July 25, 1875. The truth of this affidavit having been fully proven in the meantime, by depositions, and the court then decided, that this bond was valid and referred the cause to a commissioner, thus assuming jurisdiction of the case. Did the court err in this?

Courts of equity have always taken jurisdiction to enforce a bond, which has been lost. Originally this jurisdiction was assumed, because the common law courts furnished no

redress in such a case, as they required in a declaration on a bond *profert* of the bond, and no excuse in the declaration was regarded as sufficient to dispense with such *profert*. See *Whitefield v. Fausset*, 1 Ves. 392; *East India Company v. Boddam*, 9 Ves. 466. This rule of the common law was afterwards changed, and these courts assumed jurisdiction of suits on lost bonds. The allegation in the declaration, that the bond was lost being held to dispense with the *profert* of it. See *Read v. Brookman*, 3 T. R. 151; *Totty v. Nesbitt*, 3 T. R. 153 note. Yet, this assumption of jurisdiction by the common law courts was held by courts of equity, in accordance with a general principle applicable generally to all cases of extension of jurisdiction by the common law courts, that they still continued to have jurisdiction to furnish redress upon lost bonds. See *Walmsley v. Child*, 1 Ves. 341; *Kemp v. Pryor*, 7 Ves. 249; *Erans v. Bicknell*, 6 Ves. 182; *Mayne v. Griswold*, 3 Sandf. S. C. 478; *Hickman v. Painter*, 11 W. Va. 386; *Mitchell v. Chancellor*, 14 W. Va. 22.

In such cases, courts of equity required an affidavit to accompany the bill, when the party sought relief in the court of equity and not simply discovery, that the bond was lost and the plaintiff at the hearing had to establish satisfactorily such loss. For it was the foundation on which the court assumed jurisdiction. See *East India Company v. Boddam*, 9 Ves. 466; *Stokoe v. Robson*, 3 Ves. & B. 50. But these rules have been somewhat relaxed in this country. Thus in *Graham v. Hackwith*, 1 A. K. Marshall (Ky.) 424 it was held, that the affidavit might be dispensed with if the loss be clearly shown. This case however does not show, that objection to the jurisdiction of the court was made in the answer. It is silent on this point, being very imperfectly reported.

In the case of *Cabell's Ex'ors v. Megginson's Adm'r*, 6 Munf. 202, there was no affidavit of the loss of the bond, but the jurisdiction of the court was sustained, and in that case the court below dismissed the bill for want of jurisdiction and the court of appeals reversed the decision, though the record failed to show, that any objection was made in the court below to the jurisdiction of the court for want of such affidavit.

In the case of *Thornton v. Stewart*, 7 Leigh 128, the bill stated, that the bond was lost but there was no affidavit of its loss accompanying the bill, nor was the bill sworn to. The answer made no objection to the jurisdiction of the court on that account. Many years after, but before the hearing, an affidavit of the loss of the bond before the institution of the suit was filed, and the court below decreed in favor of the plaintiff on the lost bond. The appellate court was of opinion, that the plaintiff, on the pleadings and proof then in the case, was not entitled to a decree and remanded the cause for further proceedings. Judge Tucker in delivering the opinion of the court says: "I do not concur in the objection to the assumption of jurisdiction, being satisfied with the affidavit as to the loss of the bond; for though it was not filed with the bill, it is one of those defects, which I think, may well be supplied in the progress of the cause, when there has been no demurrer to the bill for want of it."

It seems to me, that this decision was right and even if there had been a demurrer to the bill, on well established principles, the court ought not to have dismissed the suit without giving the plaintiff leave to amend his bill and accompany the amended bill with an affidavit, that the bond was lost when the suit was instituted. The failure therefore, of the plaintiffs in this case, to accompany their bill with an affidavit of the loss of the bond, was a defect cured by the filing of such affidavit and by the proof of the loss before the first hearing of the cause. But, when the cause was first heard, the lost bond had been found; this however would not defeat the jurisdiction of the court. See *Crawford v. Summers*, 3 J. J. Marshall (Ky.) 300; *Miller v. Wells*, 5 Mo. 6.

In this case a court of equity had jurisdiction of the case stated in the bill, even had there been no allegation of the loss of the bond; for one of the objects of the suit was, according to the bill, to determine whether the defendant, Jonathan M. Bennett, did not have on his hands a trust-fund left with him to be applied to the payment of the plaintiff's demand. A court of equity alone had jurisdiction of such matter, and could alone inquire into the question, whether there was or was not such trust; and if it found that there

was, to direct the funds in Bennett's hands to be applied to the plaintiff's demand.

No affidavit of the loss of a bond is required, where the case stated in the bill would give a court of equity jurisdiction, independently of the loss of the bond. Such affidavit is only required, where if the bond had not been lost, the only remedy of the party would have been at law and not in chancery. *Purviance et al. v. Holt*, 3 Gilmar, Rep. (Ill.) p. 404. So too, the bill sought to make the land bought by the purchaser, W. A. Bott, liable for the plaintiff's demand, if the commissioner's bond was, as claimed, invalid. A vendor's lien had been retained on the land for the purchase-money, and it was unpaid if this commissioner's bond was invalid, as the commissioner would, in that case, have had no authority to collect the purchase-money. This object of the bill could only be carried out by a court of equity, and therefore if the commissioner's bond had not been lost, a court of equity in this case would have had jurisdiction.

The next enquiry is, was the circuit court right in holding this commissioner's bond valid as against Jonathan M. Bennett. He proved, that he signed it with the understanding and agreement that Lawson and Jackson, were also to sign it as securities for Cozad, and it never was signed by Lawson. The bond on its face, when delivered to the clerk, was perfect and he says when first presented to him it was signed only by Cozard, the principal, and Jackson as security, and he would not approve it unless another good name was added as surety; and, that subsequently, Bennett signed it, and when again presented he approved it. This statement is apparently sustained by the appearance of the bond, J. M. Bennett's name being the third and last signature in order, though of course it is possible that the other names were signed afterwards, but above his signature; and Jackson thinks he did sign his name after Bennett's, though he signed it above in a place, which had been left for his signature. These statements, are of course, irreconcilable with the clerk's statement, that when he first saw this bond Cozard's and Jackson's names were on it, but not Bennett's. But, assuming the statement of Bennett to be according to the real facts, would it render the bond invalid as to him?

In *Nash v. Fugate et al.*, 24 Gratt. 202, it was decided, that "a bond which is a complete and perfect instrument on its face at the time of its delivery to the obligee, was executed by persons as securities upon the condition, that it should not be delivered until executed by other persons, and it was placed in the hands of the principal obligor, and without being so executed it was delivered by the obligor to the obligee, who was not informed of the condition. The bond is the valid bond of the securities and they cannot set up the condition against the obligee." This conclusion is sustained by the great weight of authorities, and I think by reason.

The reason of this is, that the sureties having in such a case willfully caused the obligee to believe, that they were willing to become sureties on the bond in the form and with the names on it, which were there when it was delivered to the obligee; and thereby he was induced to accept such bond, and thus change his previous position, the sureties must thereby be concluded against the obligee from averring, that they were not then willing to sign the bond as the sole sureties in the form in which by their connivance and fault it had been presented to the obligee.

When one of two innocent persons must suffer by the act of a third, he who has enabled such person to occasion the loss must sustain it. The sureties by entrusting the bond to the principal in such a case make him their agent to deliver the bond to the obligee, for this is the ordinary mode of conducting such transactions. And having given the principal instructions, that he must get other securities on the bond before he delivers it to the obligee, they by giving the bond in a perfect form trust him to carry out such instructions; and if he fails to do so but delivers the bond to the obligee in such perfect form, it must be obligatory on them, for it is their fault, that injury has resulted; and the loss thus resulting they cannot shift to the obligee by proving such private instructions given by them to the principal obligor, except where the obligee is guilty either of fraud or rashness in accepting such bond.

The following are some of the authorities, which sustain this position: *Smith v. Moberly*, 10 B. Mon. 266; *Millett v. Parker*, 2 Met. (Ky.) 608; *Deardorff et als. v. Foresman*, 24

Ind. 481; *State v. Pepper*, 31 Ind. 76; *Passumpsic Bank v. Goss*, 31 Vt. 318; *State v. Peck*, 53 Maine 284; *State v. Potter*, 63 Mo. 212; and *Dair v. United States*, 16 Wallace R. 1.

It is true there are cases, which are perhaps not in perfect accordance with these views; among them are *The People v. Bostwick*, 32 N. Y. R. 445, and *State Bank v. Evans*, 3 J. S. Green 155. There are also older cases in Virginia, in which the court held, that when an instrument was incomplete on its face and indicated that others were intended to sign it, it was not binding on those who did sign it, although the condition may not have been known to the obligee when it was delivered to him. See *Ward et al. v. Churn*, 18 Gratt. 801, and *Preston v. Hull*, 23 Gratt. 600.

In the case of *Miller v. Fletcher et al.*, 27 Gratt. 405, the court seemed to have gone still further in holding a bond valid. In that case it was decided, that "if a bond, perfect on its face, is delivered to the obligee as an escrow, to be valid on another person executing it, it is valid though the condition is not complied with." In this case Judge Staples reviews a number of cases as sustaining the position, that a deed or bond cannot be delivered to the obligee as escrow, and if it be, the condition will be regarded as invalid and the deed or bond as absolute.

These cases are *Simonton's Case*, 4 Watts 180; *Duncan et al. v. Pope*, 47 Ga. 445; *Cinn., W. & Z. R. R. Co., v. Iliffe*, 13 Ohio St. 235; *Ward v. Lewis*, 4 Pick. R. 518; *Currie v. Donald*, 2 Wash. 58; 2 Lom. Dig. 38; 3 Wash. on Real Property 268. And he also cites numerous cases, which he asserts sustain the same position. See *Brackett v. Barney*, 28 N. Y. 333; *Worrall v. Munn*, 1 Seld. 238; *Jackson v. Catlin*, 2 Johns. 256; *Black v. Shreve*, 13 N. J. Eq. R. 456; *Herdman v. Bratten*, 2 Har. (Del.) 396; *Mud. & Ind. Plank Road Company v. Sterens*, 10 Ind. R. 1; *Brown v. Reynolds*, 5 Sn. [Tenn.] 639; *Gibson v. Partele*, 2 Dev. & Bat. R. 530; *Haygood v. Harley*, 8 Rich. Law R. 325; *Graves v. Tucker*, 10 Smeedes & M. (Miss.) 9; *Fireman's Insurance Company v. McMillan*, 29 Ala. 147, 161; *Shepherds' Touchstone*, vol. 1 p. 58, 59; *Hicks v. Goode*, 12 Leigh 479, 490; *Ward v. Churn*, 18 Gratt. 801.

In opposition to these views, Judge Staples finds no deci-

sion except perhaps, *Hudson v. Revett*, 15 Eng. C. L. R. 467 and *Johnson et al. v. Baker*, 4 Barn. & Ald. 440, which he comments on. He concludes, that "A doctrine sustained by such an array of authorities, a doctrine which has survived all the changes and innovations of modern reform, must have something to commend it to the approbation of the courts beyond its mere antiquity. It is not to be overturned by denunciation." He then proceeds to show the arguments, on which it is based. See 27 Gratt. pp. 412, 413.

But nevertheless, these views cannot perhaps be easily reconciled, if at all, with the decisions in *Stuart v. Livesay*, 4 W. Va. p. 45 and *Neulin v. Beard et al.*, 6 W. Va. 110. It is not however necessary for us to determine in this case, whether the law as laid down in *Miller v. Fletcher*, 27 Gratt. 403 is or is not sound law. There is nothing in the two West Virginia cases, which conflict with the law as laid down in *Nash v. Fugate*, 24 Gratt. 202 as above quoted. And for the reasons we have stated, we regard it as well sustained both by reason and authority. Admitting this as good law it is obvious, that the commissioner's bond in this case must be held valid against all the obligors in it. The handing of it to the clerk was its delivery. It was beyond controversy, that it was then a complete and perfect instrument on its face, and it is valid against all the obligors including J. M. Bennett, though it was executed by him upon the condition, that it should not be delivered until executed by Lawson. There is no question but that, when it was delivered to the clerk, he was not informed of any condition and the first time he saw Bennett, he asked him in the clerk's office, whether it was all right and he was understood by the clerk to assent to its being all right; certain it is, that he did not say there was anything wrong about it, nor did he ask to examine it to see if it was signed by Lawson, though he says it was understood, that he and Lawson were to acknowledge it in the clerk's office at the same time. He had thus good reason to believe, that it had not been executed by Lawson and yet, he made no objection to it when asked if it was all right.

There can be no question, on the authorities we have cited, that this bond is valid against him unless it be a bond, which

the law requires to be signed in the clerk's office in the presence of the clerk, as is claimed by the appellant in this case.

Section 1 of chapter 132, Code of West Virginia, p. 629, provides, that "no special commissioner appointed by a court to make a sale of property, should receive money under such decree until he gives bond before the said court or its clerk." And section 1 of chapter 10 of Code of West Virginia, p. 79, (Acts of 1872-1873, chapter 42, section 1), provides, that "every bond required by law to be taken, or approved by, or given before any court, board or officer, shall unless otherwise provided, be made payable to the State of West Virginia, with one or more securities deemed sufficient by such court, board or other officer, and be proved or acknowledged before such court, board or officer."

Now this section 1, last quoted, applies to two very different kinds of bonds. It applies to bonds of permanent public officers, such as clerks, sheriffs, State officers and other public officers, whose bonds are required to be filed in the particular offices named in the statutes. All such official bonds by section 20 of chapter 10 of Code of West Virginia, and section 17 chapter 42 of Acts of 1872-1873, are required to be reorded in a well bound book. This section 1 of chapter 10 of Code of West Virginia, applies also to a very different class of bonds such as injunction-bonds, appeal-bonds, &c., which are private bonds but are required to be taken before some public officer, and are not required to be filed in a public office nor required to be recorded.

To this second class really belongs the bonds executed by commissioner of sale appointed by chancery courts. These bonds, which taken before the clerk of the court and those included in this first section, chapter 10 of the Code of West Virginia, are not required to be filed in any public office and are not included in section 20 of chapter 40 of the Code and are therefore not to be recorded. Now section 2 of chapter 73 of Code of West Virginia, p. 469 provides, that "where any writing is to be recorded, the recorder, now clerk, shall admit the same to record in his office as to any person whose name is signed thereto, when it shall be acknowledged by him or proved by two witnesses as to him, before such recorder, now clerk." And the 5th section pro-

vides, that such writing shall also be admitted to record, when proven by certain acknowledgments certified to by certain officers, the forms of such acknowledgments for recordation being given.

When therefore a bond is required to be taken before any clerk or officer, and it is a bond, which this statute law requires to be recorded, there must be such an acknowledgment or proof before such clerk or officer, of the execution of the writing, and it must be formally certified on the bond in order to comply with these recording statutes. Otherwise it could not be recorded.

Therefore when the first section of chapter 10 of Code of West Virginia p. 79 speaks of a bond required by law to be taken or approved by, or given before any officer and directs, that it shall have the sureties approved as sufficient by such officer and further directs, that such bond is to be proved or acknowledged before such officer, this language must be construed with reference to the objects with which such proof or acknowledgment is required. If it be an official bond required to be recorded, there must be it seems to me, a preservation by endorsement on the bond of the proof or acknowledgment of it, that such proof or acknowledgment may be recorded with the bond. But if the bond be a private bond or one not required to be recorded, as for instance, the bond of a special commissioner of sale appointed by a chancery court in a particular suit, then there seems to be no such necessity for the formal endorsement on the bond of the acknowledgment of it by the obligors, or of the proof of their signatures, as it is not to be recorded and therefore an attested copy of it cannot be received in evidence in the courts as the original. In such case, such acknowledgment or proof is required it seems to me, for the protection of the officer, who is required to approve the bond, and he need make no endorsement of such acknowledgment or proof on the bond; as it would in no manner protect or serve any purpose, so far as third persons interested in the bond are concerned, where it is not to be recorded. As it seems therefore, that when the bond is in the nature of a private bond and is not required to be recorded, the acknowledgment or proof of it before the clerk or other officer, is only required

for his protection and justification in accepting and approving such bond. He waives his right to require such proof or acknowledgment, if he be satisfied, that the signatures are genuine, and if he fails to require any formal proof or acknowledgment of such signature; but his failure to do so would not vitiate the bond. For in such case no endorsement of such proof or acknowledgment is required, and therefore no evidence of it is preserved. It seems to me clear, that the obligors cannot, if they really signed the bond, object to its validity because they did not formally acknowledge it. Had they done so no record of their formal acknowledgment would have been kept. And therefore it seems to me, that the validity of the bond cannot depend upon such an acknowledgment. If it did the statute law would have required the written evidence of such acknowledgment to have been officially endorsed on the bond so that all would know that it was or was not valid.

My conclusion is, that the bond of a commissioner of sale, appointed by a chancery court will be valid, though it was neither executed in the clerk's office before the clerk nor proven before him provided, that the clerk accepted the bond officially and approved of the sufficiency of the sureties on such bond. It is certainly however, a very careless thing in a clerk to accept such a bond without its being acknowledged or proven before him. For if it should turn out, that the signatures were forgeries or for any reason the bond was not binding on the sureties, doubtless the clerk and his securities would become responsible for any loss sustained by any one, because of such carelessness of the clerk. He is authorized for his own protection to take such acknowledgment or proof, and he ought as a prudent person to endorse the fact of such acknowledgment on the bond. It would also be, in most cases, prudent to endorse on the bond, that the sureties had made oath to their sufficiency as such sureties. But the failure of the clerk to do these things, which he has a right to do for his own protection, in no manner affects the validity of the bond.

We regard therefore the provision in section 1 of chapter 10 of Code of West Virginia, p. 79, which provides, that

every bond required by law to be given before the clerk of a circuit court in cases, in which the bond is not required to be recorded, is mandatory so far and so far only as it requires such bond to be executed with one or more sureties deemed sufficient by such clerk, and therefore that the bond of a special commissioner of sale need not, in order to be valid, be either acknowledged or proven before such clerk if it be shown that the signatures are genuine. In this case the genuineness of the signatures are not disputed, and the securities were deemed sufficient by the clerk and the bond approved by him. This would be sufficiently proven by the simple fact, that it was filed away among the papers of the proper cause without any evidence accompanying it, that it was rejected; and the commissioner of sale has proceeded to collect the moneys to secure which the bond was given. See *McClure v. Colclough*, Ala. R. vol. 5 New Series p. 72, and *State v. Dandridge*, 12 Wheat. 64; *Apthorp v. North*, 14 Mass. 167. This and more than this appears in this case.

Our statute does not require endorsement of the bond by the clerk, any more than it requires the acknowledgment and approval of the bond to be manifested by any matter of record or by writing, though it is certainly prudent, in the clerk to endorse on such bond its acknowledgment and approval. See *McClure v. Colclough*, 5 Ala., new series. It is contended however, that in this case Sutton, by taking the bond of the commissioner of sale with security, payable in twelve months for the supposed balance due him, in consideration of interest at the rate of ten per cent. per annum, released the securities on his official bond, on the ground that any extension of time given to the principal, without the consent of the sureties, operates a release of the securities. It has been questioned, whether this admitted principle applies to the bond of a sheriff or any other official bond. See *Norris v. Crummev et al.* 2 Rand. 323. But, be this as it may, it certainly has no application in this case. Sutton agreed to take this new bond giving an extension of time in satisfaction of his claim, if the commissioner of sale would execute it with good security. And such an apparent bond was sent to him, but the person whose name purported to be signed to it as security testifies, that his name was forged. There is

no proof to the contrary, but it is proven that the commissioner of sale was indicted for forging this security's name to this bond, and that he thereupon fled the State. Of course the giving of this pretended bond did not for a moment suspend the right of Sutton to sue this commissioner of sale and his sureties, and therefore they are not thereby released. See *Harnsburger v. Geiger*, 3 Gratt. 144.

Again it is claimed, that the securities are not as reported by the commissioner and decided by the circuit court bound for the amount of the first bond of the purchaser, which it is claimed was paid before October 7, 1870, at which time the bond of the commissioner of sale and his sureties is dated. Many authorities are cited to show, that these sureties can can not be bound for moneys collected by the commissioner of sale before the execution of his bond. And these among other authorities are referred to as sustaining this position: *U. S. v. Giles*, 9 Cranch 212, and *Bruce v. U. S.* 17 How. 437.

It is unnecessary to consider this law question, as in my judgment the proof shows, that this bond was collected after the 7th of October, 1870. The only proof on this subject is the deposition of the purchaser, Bott, and his whole statement is: "I paid to said Cozad the commissioner of sale one thousand three hundred and eighty-five dollars divided into three payments of four hundred and sixty-one dollars and sixty-six and two third cents each. I paid said purchase-money in cash. The first payment I paid off before it fell due, and the other two as they fell due. I think but I am not certain, that the first note was paid shortly after it was given." The first note was for four hundred and sixty-one dollars and sixty-six and two third cents payable six months after date with interest from date, and it was dated July 5, 1870. The presumption is of course, that Cozad did not collect this note till he was authorized to collect it, that is till October 7, 1870, when he gave his bond. This evidence, it seems to me, was entirely insufficient to rebut this presumption. Cozad gave his bond three months before this first note fell due, and he gave it then, it is to be presumed, in order to put himself in a situation that would justify him in collecting this bond, as Bott wanted to pay it before it fell

due. To rebut this presumption an effort was made to prove, that he had given a previous bond as commissioner, but that it had been destroyed because of informalities in it; but the effort to prove this was a failure. The evidence satisfies me, that no other bond was ever given by Cozad as commissioner.

It is unnecessary and improper to determine or consider, whether there was a trust fund in the hands of Bennett, applicable to the payment of the plaintiff's claims. The plaintiff, Sutton, seems to have concluded to abandon his demand for this trust fund, and was satisfied to take a decree against Cozad and his sureties for his demand and interest and costs of suit. This he had a right to do, and the circuit court waived the consideration of this question as to how this fund in Bennett's hands was improperly applicable, reserving all the equities of all persons to this fund.

It is objected, that the amount of the commissioner's report of what was due the plaintiff is too great, as he charges interest on all the notes given by Bott, the purchaser of the land, from their date. And it is deemed, that as the decree directed the land to be sold on a credit of six, twelve and eighteen months from the day of sale without saying, that the purchase-money notes were to bear interest from the day of sale, that it ought to be presumed that Cozad, the commissioner, collected the purchase-money and the interest on it that would be due under the decree. But it is proven beyond controversy, that all the purchase-money notes did in fact bear interest from their date, and Bott proved, that he paid to Cozad all these purchase-money notes, which payments included the interest on these notes from their date.

As a matter of course, if it had been as is deemed a mere mistake in drawing the notes and this back interest was not really paid, it was perfectly easy to have proved, that this back interest was not received by Cozad, as Bott knew the fact and was examined. Finally it was claimed, that in the settlement made by Cozad with Sutton, when he gave him the note claimed to be forged, he gave it for a less sum than the commissioner reports to be due, and this settlement as it is called of the parties, ought not to be set aside. It could hardly be called a settlement, as there had been paid to Sutton but two sums ninety dollars and two hundred and ten

dollars, and these sums were to be deducted from the amount which remained in Cozad's hands, and the balance was to be paid to Sutton. Sutton relied upon Cozad for the settlement of the amount in his hands, as commissioner, and if he misstated the amount it ought to be corrected, especially as in this very transaction, he settled the balance due from him by fraudulently giving to Sutton a forged bond.

With this proof before the court of the fraudulent character of Cozad's conduct in this transaction with Sutton, it could not hesitate to correct the amount stated by him to be due and to render a decree for the correct amount, there being as I understand there was, no doubt about what was the correct amount. The decree was for the amount really due and is correct.

I am therefore of opinion, that the decree of March 6, 1878, should be affirmed and that the appellees, John S. Lyttle and John Sutton, guardian of William Sutton, must recover against the appellant their costs in this Court expended, and damages according to law.

JUDGES JOHNSON AND HAYMOND CONCURRED.

JUDGMENT AFFIRMED.

WHEELING.

SECOND NATIONAL BANK OF IRONTON v. EWING *et als.*

Submitted June 24, 1882—Decided December 16, 1882.

1. A purchaser of land under a decree in an attachment suit, who consented to the confirmation of the sale, cannot appeal from subsequent decrees in the suit for alleged errors or irregularities therein. His consent to the confirmation is a waiver of errors whether in the sale or in the decree of confirmation. And an appeal by the purchaser in such case will be dismissed as improvidently awarded.

Appeal from and *supersedes* to a decree of the circuit court of the county of Cabell, rendered on the 24th day of March, 1881, in a cause in said court then pending, wherein the Second National Bank of Ironton was plaintiff and

Thomas Ewing and others were defendants, allowed upon the petition of Vesta Laidley.

Hon. Ira J. McGinniss, judge of the eighth judicial circuit, rendered the decree appealed from.

The facts of the case are sufficiently stated in the opinion of the court.

John B. Laidley for appellant cited the following authorities: Code ch. 125, § 37; 16 W. Va. 724; 9 W. Va. 492; 1 Wall. 655; 16 W. Va. 724, 731, 732; *Id.* 625; *Id.* 794; 13 W. Va. 442, 474; 12 W. Va. 567; Code ch. 130, § 22; 9 W. Va. 190; Potts. Devar. Stat. p. 231, 45 and notes; 53 Barb. 407; 17 W. Va. 292; 15 W. Va. 131, 165; Code ch. 106, § 23; *Id.* § 31; Ror. Jud. Sales, §§ 1, 13, 14, 15, 16, 106 and notes, 124, 128, 132; 26 Gratt. 746, 650; 29 Gratt. 598; 13 Gratt. 211; Ror. Jud. Sales, §§ 174 and notes 3, 474, 502; 2 Story Eq. §§ 1127, 1135; 2 Gratt. 199; 9 Gratt. 336; 69 *Id.* 431; Drake Attach. (4th Ed.) § 89 notes 1 & 2; 5 Mich. 98; 9 Wheat. 616; 13 Gratt. 211; 2 Rob. 412; 19 Gratt. 737; 14 W. Va. 387; 9 W. Va. 13; 11 W. Va. 427; 10 Gratt. 284; 9 Gratt. 131; 3 Munf. 94; 1 Wash. 145; 15 W. Va. 677; 12 W. Va. 1; 13 Am. Dec. 640; 10 Pet. 449; 9 W. Va. 681; Drake Attach. §§ 83, 90, 436, 437, 447, 448; 10 W. Va. 130; 4 W. Va. 600; 9 W. Va. 680; 21 Gratt. 373; 10 Wall. 308; 15 Ohio 435; Code ch. 178 § 8; Code ch. 169 § 1; Code ch. 106 § 26; Code I. R. C. Va. ch. 123 § 4; Sedg. Con. Stat. 56, 641; 14 J. R. 338.

No appearance for appellee.

SNYDER, JUDGE, announced the opinion of the Court:

Bill in equity and attachment by the Second National Bank of Ironton against Thomas Ewing and wife and others to subject a tract of land in Cabell county owned by said Ewings—they being non-residents—to the payment of a debt due from the said Thomas to the plaintiff. The attachment was levied on the land, order of publication duly executed and the cause regularly set for hearing. A decree of sale was entered, and a sale made at which Vesta Laidley, the ap-

pellant, became the purchaser. The sale was reported to court and by *the consent* of the appellant the sale was confirmed by a decree entered September 4, 1878. And by like consent of the appellant the defendants were allowed six months from the date of the decree to redeem the land by paying the plaintiff's debt and costs, and a copy of said decree was directed to be served upon the non-resident defendants. The said decree, also, directed that the plaintiff should give bond "with condition that it will perform such further order as may be made by the court in this suit in case the defendant appear and make defense herein within the time prescribed by law." A copy of said decree was served on the defendants, Ewing and wife, on March 5, 1879, in Washington, D. C. And by a subsequent decree, entered March 24, 1881, the court after citing that the defendants had been served with a copy of the decree aforesaid, and they having failed to appear or ask that the cause may be re-heard, confirmed the sale absolutely, and directed a deed to be made to the appellant for the land purchased by her as aforesaid. From this decree the purchaser, Vesta Laidley, appealed to this Court, and assigns as error that by said decree the sale to her "was confirmed without condition, and releasing the conditions of the decree of September 4, 1878, without requiring the plaintiff to give bond as required by law." The bond referred to, is the one provided for by section 23 chapter 106 of the Code.

The decree of September 4, 1878, expressly requires the plaintiff to give bond as provided in said section 23 chapter 106 of the Code. And section 31 of said chapter amply protects the title of a *bona fide* purchaser. It provides that such title shall in no wise be affected, questioned or impeached by any judgment or decree recovered in the suit by the defendants. And section 34 of said chapter provides, that if in any case, upon defense being made, it shall be ascertained that the attachment was sued out without sufficient cause, judgment may be rendered against the plaintiff. The only matter, it seems to me, which could give the purchaser a right to appeal would be a decree erroneously confirming or disaffirming the sale at which she purchased. Errors in the subsequent proceedings are matters in which

she has no concern and no right to appeal from. *Kable v. Mitchell* 9 W. Va. 492; *Capehart v. Dowery* 10 *Id.* 130.

The sale in this cause having been confirmed by the consent of the purchaser, she cannot appeal therefrom. *Marrison v. Fahy* 11 W. Va. 482; *Armstrong v. Wilson* 19 *Id.*

I am therefore, of opinion, that the appeal in this cause should be dismissed as improvidently awarded, and it is so ordered. No costs are awarded, because there was no appearance by any appellee in this Court.

THE OTHER JUDGES CONCURRED.

APPEAL DISMISSED.

WHEELING.

DELAPLAIN & Co. v. ARMSTRONG & ULRICH.

submitted June 8, 1882—Decided December 16, 1882.

1. The remedy by attachment, being authorized alone by statute and in derogation of the common law, and, moreover, being summary in its effects and liable to be abused and used oppressively, its application will be carefully guarded by the courts and it will be confined strictly within the limits prescribed by the statute. (p. 213.)
2. The grounds for the attachment are the conclusions of the law. The "material facts," which the statute requires the affiant to state, are the allegations from which the court may be properly authorized to conclude that the grounds exist. Consequently an affidavit which states that the debtor did an act or acts, which of themselves are not necessarily fraudulent, with an intent to defraud his creditors, without more is not sufficient. (p. 214.)
3. An affidavit in which the material facts, stated therein, were held insufficient to sustain the grounds of the attachment. (p. 215.)
4. If a defendant desires to avail himself of the provision of the statute—section 21 of chapter 125 of the Code—which permits a plea in abatement and in bar at the same time, he must file his pleas at rules before his right to plead in abatement is lost, and he cannot plead in abatement, under said statute or the general law, after he has pleaded in bar or after the office judgment has been confirmed. (p. 217.)

21	211
26	26
26	780
21	211
27	850
21	211
28	704
21	211
29	401
21	211
42	651
21	211
47	711
21	211
48	662

21	211
50	677
21	211
58	271

Writ of error to the judgment of the circuit court of the county of Ohio, rendered on the 5th day of May, 1881, in an action in said court then pending, wherein Delaplain & Co. were plaintiffs and Armstrong & Ulrich were defendants, allowed upon the petition of said plaintiffs.

Hon. T. Melvin, judge of the first judicial circuit, rendered the judgment complained of.

The facts of the case are stated in the opinion of the Court.

Exing, Melvin & Riley for plaintiffs in error cited 16 Ohio 307, 581; 11 Wall. 581 and 5 W. Va. 22.

H. M. Russel and *W. P. Hubbard* for defendants in error cited the following authorities: 10 W. Va. 130; Drake Attach. § 110; Code ch. 125 § 16; Code ch. 125 § 46; 4 Min. Inst. ¶ II. pp. 1054, 1058; 1 R. C. Va. p. 508 § 77; Code of Va. (1860) p. 711 § 23; 15 W. Va. 290; 4 Rand. 189; 4 Conn. 424; 44 Conn. 133; 13 N. H. 79; 19 N. H. 113; 8 Kans. 228; 19 Kan. 558; 1 & 2 Pen. (N. J.) 661; 3 Sterv. (Ala.) 146; 16 Wis. 52; 41 Mo. 400; 24 Mo. 590; 26 Ga. 140; 28 Ga. 494; *Id.* 531; 41 Ga. 202; 2 Greenl. Ev. § 26; 8 Conn. 71; 3 Wend. 258; 9 N. H. 545; 7 Vt. 124.

SNYDER, JUDGE, announced the opinion of the Court:

This was an action of assumpsit brought in the circuit court of Ohio county, in which judgment was rendered for the plaintiffs for three thousand two hundred and twenty-five dollars and sixteen cents and costs. The writ of error is to an order of said court quashing the plaintiffs' attachment, issued in said action against the estate of the defendants, upon the ground that the affidavit on which the attachment was founded is insufficient. The making of said order is the only error assigned by the plaintiffs' in error in this Court.

The said affidavit, after formally stating the amount, nature and justice of the plaintiffs' claim, proceeds as follows: (1)—“That the defendants are removing and are about to remove a part of their property out of the State with intent to defraud their creditors; (2) and are converting their property into money and securities with intent to defraud their

creditors; (3) and have assigned and disposed of a part of their property with intent to defraud their creditors; (4) and have fraudulently contracted the debt on which this suit was brought; and that the material facts, upon which the said plaintiffs rely to show the existence of the grounds, upon which this application for an attachment in this action is based, are as follows: Defendants are shipping staves and railroad ties out of this State, disposing of them without applying the proceeds of sale on this debt as promised by them, and have wilfully and falsely misrepresented the financial condition of their firm in order to obtain this credit. One of the defendants, Wm. Armstrong, has since given a deed of trust on his real estate with intent to delay and defraud their creditors. The other defendant has declared his intention to leave this State to reside in another State. They neglect and refuse to make any arrangement by which the plaintiffs and other creditors will be secured, and are selling and disposing of their property without paying any part of this debt."

The remedy by attachment is in derogation of the common law and exists only by virtue of the statute, and being summary in its effects and liable to be abused and used oppressively, its application must be carefully guarded and confined strictly within the limits prescribed by the statute. An order of attachment is an execution by anticipation. It empowers the officer to seize and hold the estate of the alleged debtor for the satisfaction of a claim or demand to be established in the future and for which a judgment may never be obtained. The claim may be entirely unfounded, and even, when the demand is just the order may issue and be levied before it has become due and payable. The proceeding is to some extent the reverse of the ordinary course of judicial proceedings. The latter subjects the demand of the plaintiff to judicial investigation and permits the seizure of the debtor's property only after judgment obtained, while the former commences with the seizure of the debtor's property and afterwards subjects the plaintiffs' claim to such investigation. The statute has therefore, for the protection of the debtor, carefully defined the grounds which shall authorize a creditor to resort to this harsh remedy. It has not only done

so, but it has expressly provided, that the plaintiff shall, in addition to stating the grounds of his attachment, "state in his affidavit, the material facts relied on by him to show the existence of the grounds upon which his application for the attachment is based"—chapter 106, section 1 Code p. 554. The grounds of the attachment may be stated on the belief of the affiant, but the material facts relied on must be stated positively. Even in stating the grounds if the affiant states that he *thinks* instead of that he *believes* the affidavit will be insufficient—*Rittenhouse v. Harman*, 7 W. Va. 380.

The manifest object of the statute in requiring the material facts to be stated, is to guard the property of the debtor against improper seizure and to enable the court to judge and determine whether the information, thus supplied by the affidavit, furnishes reasonable proof of the main fact involved—the fraudulent intent of the debtor. If the evidence of this fact does not sufficiently appear from the "material facts" averred in the affidavit, the same must be regarded as insufficient. *Capehart v. Dowery*, 10 W. Va. 130. The grounds of the attachment are the conclusion of the law. The "material facts" are the allegations, from which the court must be authorized to reach the legal conclusion, that the grounds exist. It is the conclusion of the court and not of the affiant, that the statute requires. A simple affidavit of the motive, without specifying the overt indications which disclose such motive, does not establish the existence of the motive within the meaning of the statute. The only mode by which the motive or intent of the debtor can be ascertained by human intelligence is from his declarations and acts. The declarations and acts of the debtor, then, which disclose the motives and intent, which alone authorizes the attachment, must be specified in the affidavit to establish the right to issue it. A simple affidavit that a man had a particular motive, feeling or intent, without any more, is no evidence in court, it proves nothing, is incompetent and will be rejected. The only mode permitted by the law to look into the window of the heart and ascertain its feelings, motives and intentions, is through overt acts, declarations and conduct, which manifest the existence of the motive or intent. There would be no safety or propriety in any other rule

because there can be no other mode of determining the existence of the motive or intent. An affidavit that a debtor did an act which, of itself, was no proof of the intent assigned, without stating declarations or acts which disclose it, does not establish the intent. "Affirming that a party has left the State with intent to defraud his creditors may be predicated upon matters of opinion or belief, rather than upon fact. The affirmant may honestly believe and thus affirm it in general terms; whereas, if called to state the facts and circumstances upon which he reached the conclusion, the officer, being thus enabled to exercise his judgment in the matter, might well differ from him." *Ex Parte Robinson*, 21 Wend. 672; *Smith v. Luce*, 14 Wend. 237.

Let us apply these rules to the "material facts" stated in the affidavit before us. The *first* is that, "defendants are shipping staves and railroad ties out of this State, disposing of them without applying the proceeds of sale on this debt as promised by them." This statement amounts to an averment that the defendants have not paid the plaintiffs' debt as they promised to do. This is quite a common complaint. But it is certainly not of the character which authorizes an attachment. The fact that the defendants are shipping staves and ties out of the State and disposing of them does not show a fraudulent intent. The selling of staves and ties may, for all that appears, be the business in which the defendants are engaged; and if they can obtain a better price by shipping and selling them outside of the State than in it, this act is evidence of an honest rather than a fraudulent intent. It is not alleged that the act is contrary to the proper conduct of their business or that it is not usual for them to market their staves and ties outside of the State. Nor is it alleged that the money derived from such sales is not properly applied to the payment of other debts as pressing and just as the debt of the plaintiffs.

The *second* is that the defendants "have willfully and falsely misrepresented the financial condition of their firm in order to obtain this credit." This averment does not inform us by what means or devices, if any, the defendants made false representations. The averment is a mere conclusion from facts not stated or that may not exist. Assuming, how-

ever, that the averment contains a sufficient allegation of a fraudulent intent, it fails to aver that the representation was in fact relied on by the plaintiffs and the credit given or extended by reason of said misrepresentation. The plaintiffs may have known it was false when made and given the credit for other reasons satisfactory to themselves, and not because of the alleged misrepresentation.

The *third* is that, "one of the defendants, Wm. Armstrong, has since given a deed of trust on his real estate with intent to delay and defraud their creditors." In an action against two joint debtors, if the affidavit is insufficient as to one of them it will not authorize an attachment against the property of both. *Hamilton v. Knight*, 1 Blackf. 25. A deed of trust may be given without a fraudulent intent; and, as we have seen, the statement that the intent was fraudulent without more, is a mere repetition of the fact to be proved in the same words and proves nothing.

The *fourth* is that, "the other defendant has declared his intention to leave this State and reside in another State." There is certainly no fraud in this nor does it at all, warrant an inference of a fraudulent intent. It is neither unusual nor illegal for a person to leave this State and reside in another State.

The *fifth* is that, "they neglect and refuse to make any arrangement by which plaintiffs and other creditors will be secured." It does not appear from this that either the plaintiffs or any other creditors ever demanded any security for their debts, or that the defendants had the means or ability to give such security. Unless the defendants had the means or ability to secure the plaintiffs and other creditors, no fraudulent intent can be presumed from their refusal or neglect to do so.

The *sixth* and last is, that the defendants "are selling and disposing of their property without paying any part of this debt." For all that appears in this statement defendants may have been paying other just debts with the proceeds of the property sold or otherwise using them in good faith and for honest purposes.

Taking these "material facts," collectively or distributively, they do not establish all or any one of the grounds

relied on for the issuing of the attachment. The affidavit should disclose the fraudulent intent. And this being a matter which can be shown only by declarations, acts or conduct, unless the affidavit sets forth the declarations, acts or conduct of the defendants, it furnishes evidence of nothing to any one except the affiant. And if he were the only person to be satisfied of the fraudulent intent, the affidavit would be an idle form. He is satisfied in his own mind, if he is honest, before he offers to make the affidavit. The purpose of the affidavit is not to satisfy the plaintiff or the affiant, but the court, and the court can only be satisfied when the facts stated justify it in concluding therefrom that the fraudulent intent existed. The requirement that the affiant shall state the "material facts" is intended to protect the debtor against the abuse of the law permitting attachments. If the mere conclusions of the affiant are held to be sufficient, then, the debtor has no protection against either the suspicious or the dishonest creditor. On such an affidavit there is no mode of convicting either of perjury. Because it is impossible to determine whether the facts in the mind of the affiant were sufficient, if true, to justify his conclusions, or whether in fact he believed the conclusions or not; and further it is impossible to disprove that such intent may not have been entertained by the debtor. A very suspicious or avaricious creditor would believe that his debtor intended to cheat him if he failed to pay on the day the debt was due, and would be willing to swear to all manner of motives and intents. And a dishonest creditor or blackmailer would be ready to swear in the same manner without regard to his belief. But if such persons are required to swear, as the statute prescribes, to facts, that is, to declarations, acts and conduct, they would have no power over the honest debtor to seize his property. The affidavit in this case is wholly deficient in these essential and important requirements, and in my opinion the circuit court did not err in quashing the attachment for the insufficiency of said affidavit.

There being thus no error in the judgment of the circuit court to the prejudice of the plaintiffs in error, the defendants in error claim that under the ninth rule of this Court the said judgment ought to be reversed for error to their prejudice.

After the office judgment in the action had been confirmed at rules and the case had been duly docketed, the defendants at a subsequent term of the court, appeared and entered the plea of non-assumpsit, on which issue was joined. At the same time the defendant, Armstrong, tendered a plea in abatement for the want of due and legal service of the summons on him, and the defendants, also, tendered a joint plea in abatement, alleging the pendency of another action for the same matters sought to be recovered in this action. To the filing of said pleas in abatement or either of them the plaintiffs objected and the court sustained said objection and rejected each of said pleas. The defendants in error insist that section 21 of chapter 125 of the Code of 1868, abolished the rule requiring pleas in abatement to be filed at rules, and authorizes the filing of such pleas at any time a plea in bar may be filed, provided such plea is filed after the office judgment has been set aside by an issuable plea.

Under the common law practice the defendant was permitted to file but one plea, either in abatement or in bar, unless having filed a plea in abatement such plea was held bad on demurrer, or was tried by the certificate of the ordinary, or upon a replication confessing and avoiding the facts of the plea. In these and some other cases, which are exceptions to the general rule, if the issue be found against the defendant, the judgment was *respondent ouster*—*James River & Kan. Co. v. Robinson*, 16 Gratt. 434, 439. Otherwise, if the issue in the plea was found against the defendant judgment was entered for the plaintiff in the action. Subsequently this rule was abolished and the defendant permitted, by statute to plead as many several matters of law or fact as he shall think necessary—1 R. C. chapter 128, section 88; Code of Virginia chapter 171, section 23. By the Code of 1868, this statute was retained and the right extended so as to allow the plaintiff to reply by as many replications as he may deem necessary to any special plea filed by the defendant—chapter 125, section 20, Code. And in addition thereto, the said Code provides: "The defendant may plead in abatement and in bar at the same time, but the issue on the plea in abatement shall be first tried. And if such issue be found against the defendant, he may nevertheless, make any other

defense he may have to the action.”—chapter 125, section 21.

In *James River & Kanawha Co. v. Robinson*, 16 Gratt. 434, is the *quaere*: “If a defendant may not plead in abatement and in bar at the same time, the pleas being filed at the proper time?” The right of the defendant to plead in abatement and in bar at the same time, being thus considered in doubt and the general rule, as we have seen, being that after an issue of fact found against the defendant on a plea in abatement, judgment was entered for the plaintiff without permitting the defendant to make any further defense to the action, the Legislature in order to remove the doubt in the one instance and to remedy, what seemed to be a harsh rule in the other, passed said statute—section 21—and now the defendant may not only plead in abatement and in bar at the same time, but, after pleading in abatement, he is entitled to make any other defense to the action he may have, notwithstanding the issue is found against him on such plea. If, however, the defendant would avail himself of his right, under the statute, to plead in abatement and in bar at the same time, he must do so at rules before his right to plead in abatement has been lost, and he cannot plead in abatement after he has pleaded in bar or after office judgment is confirmed. *Hinton v. Bullard*, 3 W. Va. 582; *Abell v. Penn. Ins. Co.*, 18 *Id.* 400; *Carey & Co. v. Burruss*, 20 W. Va. 570.

I am, therefore, of opinion that the defendants’ said pleas in abatement were tendered too late, and that they were properly rejected by the circuit court.

For the foregoing reasons the judgment of the said circuit court must be affirmed with costs to the defendants in error and thirty dollars damages.

THE OTHER JUDGES CONCURRED.

JUDGMENT AFFIRMED.

WHEELING.

HUMPHREYS v. PATTON *et al.*

Submitted June 24, 1882—Decided December 16, 1882.

(*SNYDER, JUDGE, Absent.)

A tax-payer will not be allowed to offset the sheriff's personal indebtedness to him against the taxes due the State, county or district.

Appeal from and *supersedeas* to a decree of the circuit court of the county of Monroe, rendered on the 13th day of October, 1876, in a cause in said court then pending, wherein A. R. Humphreys was plaintiff and James F. Patton and others were defendants, allowed upon the petition of said defendants.

Hon. Homer A. Holt, judge of the eighth judicial circuit, rendered the decree appealed from.

The facts of the case are stated in the opinion of the Court.

Frank Hereford, *A. N. Campbell* and *Joseph D. Logan* for appellants cited the following authorities: Hil. Tax, 421; 8 Mich. 132; Hil. Tax, 16, 17; 2 Abb. L. Dict. 539, 540; Hil. Tax. 17, 18.

A. F. Mathews and *A. C. Snyder* for appellee cited the following authorities: Code, ch. 130 § 23; 14 W. Va. 94, 95; 8 W. Va. 245; 31 Gratt. 362; *Id.* 369.

JOHNSON, PRESIDENT, announced the opinion of the Court:

In September, 1875, Alexander R. Humphreys filed a bill of injunction in the circuit court of Monroe county alleging, that he was assessed in the county of Monroe, with over six hundred dollars for State, county and district taxes for the year 1873 and over four hundred dollars for the year 1874; that tax-tickets for said years and for said amounts were placed in the hands of S. A. Clark, late sheriff of said county, for collection; that in July, 1875, said Clark died; that dur-

*Cause submitted before Judge S. took his seat on the bench.

ing the years, in which said tax-tickets came into the hands of said Clark, he, the said Clark, was a dealer in cattle and purchased cattle of plaintiff; that at the instance and request of said Clark and by direction of plaintiff the purchase-money of a portion of the same was applied to satisfying the tax-tickets aforesaid; that plaintiff believed that the cattle-book, memoranda and other papers in the hands of J. F. Patton, administrator of the estate of said Clark, show, that the said sums had been wholly paid off and discharged with the exception of a balance of eighty-three dollars, which plaintiff is ready and willing to pay *upon receiving the credits* for the sums paid by him; that since the death of said Clark the tax-tickets for the years 1873 and 1874 have been placed in the hands of William Adair, late deputy sheriff and at present acting sheriff of Monroe county, who is now about to collect the same; that said tax-tickets with the exception of said eighty-three dollars have been wholly paid off and discharged and should have been surrendered and would have been given up, had said Clark lived; that plaintiff is threatened with the levy and sale of his property to satisfy said tickets. He prays, that Patton, administrator of Clark, deceased, and acting sheriff Adair be made defendants and required to answer, &c., that Patton be required to produce the cattle-book, memoranda, &c., and that the defendants be enjoined, &c.

The plaintiff was permitted to file an amended bill, in which he says, that the original bill was filed in great haste, and alleges, that the books of said Clark show, that the said taxes for the years 1873 and 1874 have been fully paid, and that they were paid in a manner different from that set up in the original bill; that during the years 1873 and 1874 said Clark and Robert J. Glendy were partners in the purchase and sale of cattle; that during each of said years the plaintiff sold cattle to Glendy & Clark for an amount of money greater than the taxes due from plaintiff; that said Clark as sheriff had in his hands sundry executions and other legal process, upon which he collected for plaintiff considerable sums of money; "that after the sale of said cattle and the collection of said executions, and about the time the taxes aforesaid became due and payable from plaintiff, the plaintiff and the said Clark made an agreement, that the said Clark

should retain the money collected by him on said executions and collect from said Glendy and Clark the money due to plaintiff on the cattle sold them as aforesaid and retain from the money so collected, after crediting the executions on said taxes a sum sufficient to pay off all the taxes due from the plaintiff for the years 1873, and 1874, as aforesaid; that in pursuance of said agreement said Clark did receive and collect from said Glendy and Clark the money due from them to the plaintiff, and the said Clark so informed the plaintiff and paid over to him a large sum of money, which he told the plaintiff was the sum coming to him over and above the amount retained by him as sheriff to pay the whole of said taxes; that plaintiff afterwards demanded from said Clark his tax-tickets, and Clark told him, that they were fully paid and perhaps overpaid, and as soon as he could get time to do so, he would hand them to the plaintiff, and before they were delivered to plaintiff, Clark died." He prayed, that the injunction be continued in force, &c.

Patton administrator, and Adair answered the bill, denying the material allegations of the bill, and insisting, that "a public officer will not be permitted to deal with the public revenues in satisfaction of his personal liabilities; that money alone can satisfy tax-tickets; and no unexecuted agreement of satisfying the taxes due by a citizen to the State, county and district authorities by the individual indebtedness and liability of the public collector to the taxpayer will be countenanced or tolerated." With the answer is exhibited a paper found among the papers of Clark, which would seem to show, that Clark was indebted to Humphreys in the sum of eighty-four dollars and forty cents after crediting him with the taxes of 1873 and 1874.

A number of depositions was taken in the cause; among them was the deposition of the plaintiff, which is excepted to, but in the view, which I take of this case it makes no difference, whether Humphreys' deposition is read or not. The fact as shown by the depositions is, that Clark was indebted to Humphreys in a greater amount than the taxes of 1873 and 1874 and that by said indebtedness the taxes were paid. True Glendy testifies that he settled with Clark for these cattle transactions at the end of each year and paid

the money to him, to be paid to the parties, from whom they had bought cattle, of whom Humphreys was one.

On the 13th day of October, 1876, upon a hearing of the cause the court perpetuated the injunction except as to seven dollars and two cents and gave costs against the administrator of Clark. From this decree upon petition of Patton, administrator, and Adair, an appeal with *supersedeas* was granted.

The only question to be decided is: Were the taxes of Humphreys for the years 1873 and 1874, paid? We will not consider, whether an injunction would lie in this case. There was no demurrer to the bill; and the point was not raised in the court below nor here. It is also unnecessary to decide, whether Humphrey's deposition is competent evidence, because it is of the same character as the other testimony in the case.

Does the record show, that the taxes were paid? This Court held in *Wiley v. Mahood*, 10 W. Va. 206, that, if an attorney had a claim for his client to collect, he could receive nothing but money without the consent of his client; and that if the attorney owed the debtor of his client, he could not settle his own indebtedness by giving up the claim of his client. If a debt could not be paid in that manner, in case of an attorney and a debtor of a client, it seems to us, that for a much stronger reason a tax-payer cannot be allowed to offset the personal indebtedness of the sheriff to him in satisfaction of a public demand against the tax-payer. In *Elliott v. Miller*, 8 Mich. 132, it was held: "Taxes are due to the public and not to the tax-collector individually, and claims against him are not a legal tender for or offset against such charges." The public cannot afford to wait for its necessary revenues until litigations like this are settled. A sound public policy as well as correct legal principle requires us to hold, that the tax-payer will not be allowed to offset the sheriff's personal indebtedness to him against taxes due to the State, county or district. The State must have her revenues, and she must not be delayed in collecting them by any settlements to be made of indebtedness from the sheriff to any tax-payer. Nor is it just to the sureties of the sheriff to permit the offsetting of the individual indebtedness of the sheriff to the tax-payer with taxes for which such sureties are liable.

The decree of the circuit court of Monroe county rendered on the 13th day of October, 1876, is reversed with costs to the appellant, J. H. Patton administrator of S. A. Clark, deceased, and this Court proceeding to render such decree, as the said circuit court ought to have rendered, the injunction is dissolved and the bill dismissed with costs.

JUDGES HAYMOND AND GREEN CONCURRED.

BILL DISMISSED.

WHEELING.

W. H. TOMPKINS v. THE KANAWHA BOARD.

Submitted January 23, 1880—Decided December 16, 1882.

(*SNYDER, JUDGE, Absent.)

1. The Kanawha Board being authorized by law to charge tolls on the Kanawha river is bound to keep the river in navigable condition and is liable for damages sustained by reason of its negligence in failing so to do. (p. 229.)
2. The Kanawha Board is not an insurer of the goods shipped on said river and is only liable for losses, which may occur by reason of its negligence in failing to keep the river in navigable condition. (p. 230.)
3. Although an instruction propounds the law correctly, and the court modifies it, the judgment will not be reversed for that reason, unless the modification was to the prejudice of the exceptor. (p. 230.)
4. Remote negligence of the plaintiff will not prevent his recovery for an injury immediately caused by the negligence of the defendant. The negligence of the plaintiff, which defeats his recovery, must be a proximate cause of the injury. (p. 230.)
5. The question of negligence is for the jury upon all the evidence before them and upon the duties imposed by law upon the defendant; and any want of proper diligence in performing such duties is negligence. (p. 231.)
6. Where the law imposed upon a company, authorized to collect tolls upon a river, the duty of keeping the chutes free from ob-

*Case submitted before Judge S. took his seat on the bench.

31	254
36	216
21	224
38	40
38	614
21	224
40	224
21	224
65	736

structions, proof that a log was in a chute in such river, on which the loss occurred, *prima facie* shows negligence in the defendant-company and casts the burden on it to show, that it used due diligence to discover and remove such obstruction. (p. 231.)

7. The general rule is, that where personal property is being shipped to a certain place for sale, and a loss occurs, the measure of damages is the difference between the price, at which the property was bought, and its market value at the place where, and at the time, when it should have been delivered. But where the owner and shipper of the property had contracted to sell it in the place where it was to be delivered, the price, which was agreed to be given for it, is the best evidence of its value; and the measure of damages in that case is the difference between the cost of the property and such price. (p. 232.)
8. It is not an error for which a judgment will be reversed, to exclude evidence from the jury, unless such exclusion was to the prejudice of the exceptor. (p. 232.)
9. There being conflicting evidence, held on well established principles, that the judgment will not be reversed, verdict set aside and new trial granted. (p. 233.)

Writ of error and *supersedeas* to a judgment of the circuit court of the county of Kanawha, rendered on the 18th day of June, 1879, in an action in said court then pending, wherein W. H. Tompkins was plaintiff and The Kanawha Board was defendant, allowed upon the petition of said Board.

Hon. Joseph Smith, judge of the seventh judicial circuit, rendered the judgment complained of.

The facts in the case are stated in the opinion of the Court.

William A. Quarrier for plaintiff in error:

1. This case having been properly dismissed at the rules, it was error in the circuit court to reinstate it and set aside the dismission after the 15th day of the term that next succeeded the dismission. Code, section 7, section 60, section 46 of chapter 125. *Enders v. Birch*, 15 Gratt. 64.

2. The Kanawha Board is a peculiarly West Virginia creation. It inherits none of the duties or liabilities of the old James River and Kanawha Company. Its powers, duties

and liabilities are only those prescribed in the Acts of its organization. Acts of West Virginia, 1869, page 75.

3. The Kanawha Board is a branch or department of the State government. It cannot be sued by any individual in the State courts at all, and particularly not in an action *ex delicto* to recover remote and consequential damages. *Sayer v. Northwestern Turnpike Co.* 10 Leigh, 454; *Dunnington v. same*, 6 Gratt. 160.

4. The court erred in refusing defendant's instructions as asked, and in amending them, and giving the instructions asked by the plaintiff.

5. The court erred in rejecting evidence of the institution of the suit of the *Plaintiff v. Steamer Lookout*.

C. Hedrick for plaintiff in error cites the following authorities: 13 Gratt. 549, 550, 551; *Id.* 556, 557; 6 Gratt. 170, 171; 10 Leigh 454.

S. A. Miller for defendant in error cites the following authorities: Session Acts of Va. (1857-58) 93; Acts Va. (1862) at Wheeling, 53; Acts Va. (1863) at Wheeling, 64; Acts W. Va. (1869) 75; 10 Leigh 452; 6 Gratt. 170, 171, 172; 13 Gratt. 541, 551; Acts Va. (1859-60) 115; Acts Va. (1862) at Wheeling, 56, 151; Acts W. Va. (1869) 76; 16 Gratt. 433; Code ch. 35; Sherm. & Redf. Neg. 208, §§ 178, 179 and note; L. R. 93; H. & N. 164; H. & N. 308; 16 N. Y. 161, and note; 50 N. Y. 236; Hill, New Trials, p. 339, § 5 *et seq.*; *Id.* p. 340 § 10.

JOHNSON, PRESIDENT, announced the opinion of the Court:

In October, 1877, the plaintiff brought his action of trespass on the case against the defendant in the circuit court of Kanawha county to recover damages for the loss of a barge-load of salt. The declaration is as follows:

"Wm. H. Tompkins complains of the Kanawha Board, a corporation duly authorized by laws of the State of West Virginia, and the laws of the State of Virginia, and existing in the State of West Virginia, of a plea

of trespass on the case, and the said plaintiff says that, whereas, previous to the year 1863, and up to 20th of June of said year, a public improvement extending through the then State of Virginia, and known as the James River and Kanawha Company, was vested by and with and under the laws of the State of Virginia of the complete control, ownership and franchises of the corporation known as the James River and Kanawha Company aforesaid, by which the full control of the Kanawha river for the collection of tolls thereon, with the obligation to keep up all the channels, chutes and currents, as applied to the navigation of said Kanawha river as adopted by the said James River and Kanawha Company, and to keep the same free from obstruction in said chutes or channels so as to preserve, keep up and maintain in good order a good navigation for all the citizens of the said State of West Virginia and of the United States, of the said Kanawha river.

“And the said plaintiff further says that after the formation and creation of the State of West Virginia, to-wit, on the 20th June, 1863, and by the laws of the State of West Virginia thereafter enacted and passed by said State, the defendant, the said Kanawha Board, was created, incorporated and constituted, and to said defendant was transferred all the rights heretofore held, exercised and owned by said James River and Kanawha Company, with and including the right to collect and enforce the payment of certain tolls and charges fixed by law for the navigation of said river and the transportation of freight by boats and other craft upon and on the waters of said Kanawha river, and which right the said defendant has hitherto, before and at the time of the grievance herein complained of, and still is, enforcing and has enforced; and upon it, the said defendant, was imposed all the liabilities, duties and obligations heretofore resting and imposed upon the said James River and Kanawha Company, by which the said defendant undertook and promised and agreed and upon which was imposed by law the duty to keep all the chutes, channels and currents of said river free from obstructions, &c., as might impair the navigation of said Kanawha river. And the said plaintiff says that heretofore, to-wit: on the 11th day of November, 1872, at the county aforesaid, the

said plaintiff shipped on a certain barge called the Ben J. May, to be towed by the steamer Lookout one thousand five hundred barrels of salt, of great value, to-wit, of the value of two thousand five hundred dollars, said salt to be shipped on said barge and towed to the port of Cincinnati, in Ohio, on the Ohio river, and that said salt was received in good order, and the said barge and steamer Lookout were each of them seaworthy and in good condition, but the said plaintiff avers that in passing through the chute known as thirteen-mile chute or shoals in the Kanawha river, at a point between the mouth of the Kanawha river and Loup creek shoals thereon the said barge was sunk, and the same and its cargo wholly lost. And the plaintiff avers, that said barge and said fifteen hundred barrels was lost, by the negligence of the defendant in this suit; that it negligently and carelessly permitted the said chute to be so obstructed by logs, drift wood, &c., &c., concealed from ordinary observation of navigators, and especially those navigating the steamer Lookout, and barge aforesaid, with its cargo, aforesaid, as to cause the barge, aforesaid, with its cargo aforesaid, to be wholly lost and destroyed, to the great injury and loss of the plaintiff. Therefore the plaintiff sues for the damage of five thousand dollars."

The defendant appeared and demurred to the declaration, in which the plaintiff joined; and the said demurrer was overruled by the court, and the defendant pleaded not guilty.

On the 16th day of June, 1879, the case was tried by a jury, and a verdict was rendered for the plaintiff for one thousand nine hundred and eighty-seven dollars and fifty-nine cents damages, which verdict the defendant moved the court to set aside, which motion the court overruled and entered judgment on the verdict. During the trial the defendant presented their several bills of exceptions, which were signed by the court. The *first*, certified the evidence and was to the refusal of the court to set aside the verdict and grant a new trial; the *second* was to the giving and refusing of instructions; and the *third* was to the action of the court in excluding certain evidence.

To the judgment the defendant obtained a writ of error and *supersedeas* without bond. The plaintiff after giving notice to the defendant appeared in this court and moved to

dismiss the writ of error and *supersedeas*, unless bond was given, and the defendant, the plaintiff in error, resisted the motion on the ground, that the action would not lie against it, because all the property which it owned, belonged to the State, and the board was but the agent of the State, and the action was in effect a suit against the State. This court upon a hearing decided, that the action would lie, and ordered, that the writ of error and *supersedeas* be dismissed, unless a proper bond was given within a specified time. (*Tompkins v. Kanawha Board*, 19 W. Va. 257). The bond was given; and now the case must be decided upon its merits.

The first error assigned is the overruling the demurrer to the declaration. The case of *James River & Kanawha Co. v. Early* 13 Gratt. 541, was very similar to this in many respects. There the suit was trespass on the case to recover the value of a boat and its cargo of salt, which had been lost by striking a snag in the Kanawha river. The court held in that case, that the said company being authorized by law to charge tolls on the Kanawha river not exceeding those allowed to be charged by its predecessor the James River Company, is bound to keep the river in the same navigable condition, in which the James River Company was required to keep it, and is liable for any damages sustained by its failure so to keep it. But it was further held, that the James River and Kanawha Company was only required to improve the Kanawha river in the mode suggested by the report of the principal engineer of the State made in January, 1820. This did not contemplate a continued line of improvement, but that specified work should be done at specified places. And for damages occurring in consequence of obstructions at other places the James River and Kanawha Company, the successors of the James River Company, was not responsible. And as the loss in that case occurred at a place, that the company was not charged to keep in order, it was held, that the company was not liable therefor. There can be no doubt, that the Kanawha Board, were charged with the duty of keeping the Kanawha river free from obstructions at the thirteen mile chute, where the loss in this case occurred, which is between the mouth of the river and Loup creek shoals. Since the decision of the case of *James River and*

Kanawha Company v. Early, *supra* in July 1856, the Acts of February 15, 1858, and March 23, 1860, were passed, which do provide for a continuous improvement from the mouth of the river to Loup creek shoals, and the Act of March 3, 1869, fixes the rate of tolls from Charleston to the mouth of the river. The declaration it seems to me states a good cause of action, and is in proper form. The demurrer thereto was properly overruled.

The defendant asked the court to give the following instruction to the jury: "The Kanawha Board are not insurers of the freight shipped on the Kanawha river. In this suit they cannot be made liable, unless the jury are satisfied, that they were guilty of carelessness and negligence in allowing the log to remain an unreasonable time in the thirteen-mile chute, upon which the barge carrying the plaintiff's salt was sunk." The court refused to give the instruction, as asked, but modified it by adding the following: "Or that by due diligence and care on the part of themselves or their agent they could have discovered and removed the same." The modification of the instruction states the law correctly; and while it is not perceived, that it makes any material change in it, the modification certainly did not prejudice the plaintiff in error.

The defendant also asked the court to give the following instruction to the jury: "If the jury believe from the evidence, that the loss to the plaintiff occurred in material part by the carelessness and want of skill of those having charge of the steamer "Lookout" and barge, which carried plaintiff's salt, the plaintiff cannot recover in this action." This instruction the court also refused to give, as asked, but modified it as follows and then gave it: "But that such carelessness or want of skill on the part of those having charge of the steamer 'Lookout' and barge must have been to such an extent, as to have contributed to the loss, which ordinary diligence might have avoided." It would have been error to have given this instruction without modification. Remote negligence of the plaintiff will not prevent his recovering for an injury immediately caused by the negligence of the defendant. The negligence of the plaintiff, which will operate to defeat his recovering, must be a proximate cause of the

injury. (*Blaine v. C. & O. R. R. Co.*, 9 W. Va. 253; *Sheff v. Huntington*, 16 W. Va. 307; *Washington v. B. & O. R. R. Co.*, 17 W. Va. 190. The modification was proper.

The defendant also asked the court to give the following instruction to the jury: "The burden of proof in this suit is on the plaintiff to show, that there was negligence and carelessness on the part of the defendant, and unless he so proves, the jury must find for the defendant." The court refused to give the instruction, as asked, but modified it by adding the following and then gave it: "The question of negligence or carelessness is one for the consideration and decision of the jury upon all the evidence before them and upon the duties imposed upon the defendant by law; and any want of diligence in not performing such duty is negligence and carelessness on their part." While the instruction as asked laid down the law correctly, yet it might have misled the jury as to what was meant by negligence and carelessness, and the words added, we think, were proper, as they informed the jury, what would under the circumstances of this case constitute negligence and carelessness. If the instruction had not been modified, the jury might have thought, that before the defendant could be held liable, it was necessary, that it should have been notified, that the log was in the chute, and that with such knowledge it neglected to remove it; whereas it was the duty of the defendant, which was charging tolls on said river, to ever be on the alert to see, that the channel was kept free from obstructions.

At the instance of the plaintiff the court gave the following instruction, to which the defendant objected: "The court instructs the jury, that, if they believe from the evidence, that thirteen-mile chute was obstructed by a log lying therein, by reason of which the barge was sunk, and plaintiffs' salt was lost, then upon proof of such obstruction the burden of proof is on the defendant to show, that it used due diligence to ascertain and remove said obstruction before said loss." This instruction is correct. The law charged the defendant with the duty of keeping said chute free from obstructions, and when the plaintiff proved, that the chute was obstructed by a log, on which the barge was sunk and

- plaintiffs' cargo was lost, the burden was then cast on defendant to show, that it had used due diligence to discover and remove the said obstruction.

At the plaintiff's instance, the court also gave the jury the following instruction, to which the defendant objected: "The court further instructs the jury, that if they believe from the evidence, that the plaintiff had sold the salt, the loss of which is in controversy, at a stipulated contract price then, that price should be the measure of damages so far as the value of said salt may be concerned." The general rule is, that where personal property is being shipped to a certain place for sale, and a loss occurs, the measure of damages is the difference between the price at which the property was bought, and its market value at the place of and at the time when it should have been delivered. *Boyd v. Gunnison*, 14 W. Va. 1. This rule is established to ascertain what the party had in fact lost. But where he has actually contracted to sell the property in the place where it is to be delivered at a specified price, that price at which it was so contracted to be sold is the best evidence of its value, and of the loss which its owner had sustained. We think the instruction was correct.

One of the bills of exceptions shows, that on the trial the defendant was permitted, without objection, to introduce evidence to prove, that the plaintiff, immediately after his loss, had sued out in the United States court for the district of West Virginia, a libel in his own name against the steamer Lookout, her tackle, apparel and furniture, for the loss of the same salt which had been sunk in the thirteen-mile chute and, that said case had been decided against him, and in favor of the steamer Lookout, and, that after the evidence had been closed and the case had been argued, the plaintiff moved to strike out all said evidence and the court instructed the jury to disregard said evidence.

Did the court err in this? If the bill of exceptions had shown, that as soon as the loss occurred, the plaintiff had libeled the steamer Lookout, and had stopped there and it had not appeared, that the libel had been decided against him, this would have been admissible as tending to show, that at that time the plaintiff attributed the loss of his salt to the negligence of the steamer Lookout, which was towing his barge,

and not to the defendant, and it would have been error to have excluded it from the jury. But when it was shown by the defendant, that the libel suit had been decided against the plaintiff, it was also shown, that the plaintiff was mistaken in supposing, that the loss was occasioned by the negligence of the steamer Lookout, and it was not prejudiced by the exclusion of the testimony from the jury.

Did the court err in refusing to set aside the verdict and grant a new trial? The question of negligence was for the jury, and the evidence on that point was conflicting, and upon well established principles, this Court cannot interfere with the verdict under such circumstances as we are not able to say, that by excluding all the parol evidence of the exceptor, in conflict with that of the plaintiff, the verdict was not warranted by the evidence. The judgment of the circuit court is affirmed with costs and damages according to law.

JUDGES HAYMOND AND GREEN CONCURRED.

JUDGMENT AFFIRMED.

WHEELING.

McMULLEN v. EAGAN *et al.*

Submitted June 18, 1881—Decided December 16, 1882.

(*SNYDER, JUDGE, Absent.)

1. If the certificate of the acknowledgment of a deed by a married woman living with her husband shows, that she and her husband jointly acknowledged the deed before a proper officer, such deed is inoperative to convey her interest, though the certificate shows, that she was after such acknowledgment examined privily and apart from her husband by the officer and had the deed fully explained to her and declared, that she had willingly executed the same and did not wish to retract it. (p. 244.)
2. If such deed be recorded, and afterwards the officer re-writes his certificate and signs the same dating it as of the time of the first acknowledgment, and such second certificate states, that she appeared before the officer, and being examined by him privily and apart from her husband and having the deed fully ex-

*Cause submitted before Judge S, took his seat on the bench.

21	233
37	178
21	233
38	296
21	233
49	380
42	300
21	233
45	654
21	233
49	11
49	659
21	233
603	382

plained to her she acknowledged the same to be her act and declared, that she had willingly executed the same and did not wish to retract it, though such second certificate is in due form, yet the deed will still be inoperative to convey her interest in the land, as the officer has no authority to correct his first certificate, though it was not written in such way as showed the real facts. (p. 245.)

3. But if she and her husband afterwards go before the clerk of the county court in his office and acknowledge this deed in the manner prescribed by the statute, such acknowledgment if endorsed on the deed and duly recorded by the clerk, which it is his duty to do, this will cure such defect in the first acknowledgment and render the deed operative to convey her interest in the land. (p. 246.)
4. A married woman living with her husband can convey under our statute-law her separate real estate by joining with her husband and by having the deed acknowledged after privy examination of her in precisely the same manner, as she always could convey her real estate, which was not her separate property; and she can convey such real estate in no other manner. (p. 246.)
5. An answer in this State may state such facts, as would be the basis of a cross-bill, and pray affirmative relief; and it then has the same effect, as a cross-bill formerly had. But this can only be done, when a cross-bill could have been properly filed; it can not ask such affirmative relief by introducing into it other matters distinct from those, which were stated in the original bill, and on which it was based, but it must be confined to matters involved in the original bill. (p. 247.)
6. If therefore an injunction to a sale of lands by a trustee be asked in a bill, on the ground that the deed of trust was wholly inoperative to convey the grantor's land because of fatal defects in the deed of trust, the answer can not pray affirmative relief so as to operate as a cross-bill, when the prayer for relief is based on the fact, that the deed of trust was given to secure the purchase-money of the land, and the deed to the grantor if the deed of trust reserved a vendor's lien, which the answer prays may be enforced. In such case there would be brought into the answer as the basis of the prayer for affirmative relief matters distinct from those stated in the bill, which can not be done. (p. 248.)
7. But if the bill of injunction goes further, and sets out a deed, in which the vendor's lien is reserved, and alleges, that it is fatally defective in not effectually conveying the contingent right of dower of a wife, who signed it, and alleges that more is for this and other reasons claimed to be due under the deed of trust than is really due, and such bill asks general relief, such affirmative relief by the enforcement of the vendor's lien

may be asked in the answer ; for such relief is confined to matters involved in the original bill. (p. 248.)

8. A party not named in the bill, but whose interest in the subject-matter of the bill only appears in the answer of a defendant, can not file an answer to the bill as a defendant, if his doing so without the bill being first formally amended is objected to by the plaintiff ; and if the court permits such answer to be filed and afterwards renders a decree against the plaintiff in favor of such party thus informally introduced into the case, the Appellate Court on the appeal of the plaintiff will reverse such decree. But where the record shows affirmatively, that the plaintiff was present in court, when the party was thus informally introduced into the cause and did not object but filed a replication to such answer, and the cause with reference to such new party was fully and fairly heard on its merits without objection in the court below, this will be regarded as a waiver by the plaintiff of such defect in the proceedings in the court below, and the Appellate Court would not reverse the decree for such defect in the proceedings. (p. 250.)
9. The circuit court ought not to set aside a sale by a commissioner for inadequacy of price, when there had been two sales of the property previously, and the last sale was not made until after repeated adjournments by the commissioner of sale with a view to the getting of the highest possible price, merely because there was a slight apparent preponderance in the weight of the affidavits filed indicating, that the price obtained was not the full value of the property. When there is a conflict of views as to the value of property, previous sales and attempted sales are entitled to more weight than the mere opinions of some persons as to its value. (p. 252.)
10. If the name of the purchaser at such a sale be by mistake not named in a decree confirming such sale, but by mistake the name of some other person is inserted in the decree as the purchaser, such mistake is no ground for reversing the decree in the Appellate Court, if no motion to correct it has been made in the court below. (p. 253.)

Appeal from and *supersedeas* to two decrees of the circuit court of the county of Kanawha rendered respectively on the 30th day of June, 1876, and on the 20th day of December, 1878, in a cause in said court then pending, wherein Catharine McMullen was plaintiff, and David Eagan and others were defendants, allowed upon the petition of said McMullen.

Hon. Joseph Smith, judge of the seventh judicial circuit, rendered the decrees appealed from.

GREEN, JUDGE, furnishes the following statement of the case :

On October 29, 1872, David Eagan and Mary F., his wife, conveyed to Catharine McMullen, the wife of James H. McMullen, a house and lot in Charleston, West Virginia. The consideration recited in the deed was three thousand four hundred dollars, of which one thousand eight hundred dollars is stated to be paid in cash and the balance was to be paid as follows : Two hundred dollars in sixty days and the residue, two thousand four hundred dollars, in six equal annual payments of four hundred dollars each, all bearing ten per cent. interest from the date, and evidenced by the notes of Catharine McMullen to David Eagan of same date. A lien was expressly reserved to secure these deferred payments. The conveyance was with general warranty of title. The acknowledgment was as follows :

"STATE OF WEST VIRGINIA,

"County of Kanawha, ss. :

"On this 30th day of October, 1872, before me, Henry C. McWhorter, a notary public in and for said county, came David Eagan and Mary F. Eagan, his wife, whose names are signed to the foregoing writing, bearing date on the 29th day of October, 1872, and acknowledged the same to be their act and deed : and the said Mary F. Eagan, being by me examined privily and apart from her said husband, and having the writing aforesaid fully explained to her, she, the said Mary F. Eagan, declared that she had willingly executed the same and does not wish to retract it.

"Given under my hand the 30th day of October, 1872.

"H. C. McWHORTER,

"Notary Public."

On the day on which this deed bore date, but before it was acknowledged for recordation, a deed of trust was executed by Catharine McMullen, in which her husband united, conveying the same house and lot to F. B. Swann, trustee, to secure the payment of these seven notes, the principal of which amounted to two thousand six hundred dollars. This deed of trust had no special provisions in it in reference to the sale under it. The following was the acknowledgment

ment of it for recordation, made the same day it was executed:

"KANAWHA COUNTY, RECORDER'S OFFICE, }
"29th October, 1872. }

"This deed was this day presented to me and duly acknowledged by James H. McMullen and Catharine McMullen, his wife, parties thereto; and the said Catharine, wife of the said James H. McMullen, being examined by me privily and apart from her husband, and having the deed aforesaid fully explained to her, declared she had willingly signed and executed the same, and that she wished not to retract it, and thereupon the same is admitted to record.

"Teste:

"A. CUNNINGHAM, *Rec'r*

"Teste:

"JOEL S. QUARRIER,

"*Clerk Kanawha County Court.*"

The trustee advertised this house and lot for sale under the provisions of this deed of trust, the sale to take place at the front door of the court-house in Charleston on March 13, 1876, and the terms of sale to be so much cash, as will pay eight hundred dollars, with ten per cent. interest thereon from October 29, 1872, and the residue in four equal payments payable respectively on October 29, 1875, October 29, 1876, October 29, 1877 and October 29, 1878; and the advertisement stated, that the first of these notes of two hundred dollars was paid, and the others were then due.

On March 6, 1875, an injunction was awarded prohibiting T. B. Swan and David Eagan from selling or offering to sell this house and lot until the further order of the court or of a judge in vacation. The order granting this injunction was addressed to the clerk of Kanawha circuit court and was signed by Evermont Ward who did not state in the order, that he was a judge, nor did he sign his name as a judge. He was not the judge of Kanawha circuit but of an adjoining circuit. The bill on which this injunction was awarded, was filed by Catharine McMullen, who alleged, that the deed to her from Eagan and wife was defective, as it was not properly acknowledged by David Eagan's wife, and that the deed of trust was also defective, it not being properly ac-

knowledge by Catharine McMullen the plaintiff. This bill also alleges, that notices of said sale by the trustee were not given in the manner required by the Code of West Virginia. The bill further alleges, that the notice of the sale also states, that "The sum of two thousand four hundred dollars with ten per cent. interest thereon is now due and payable;" but this appears on the face of the bill to be a mistake, as this notice is filed with the bill, and it states, that "two thousand four hundred dollars with ten per cent. interest is now due" but does not say it is "now payable," but on the contrary indicates the reverse. The bill further alleges, that complainant "believes and has been informed, that the first of said notes, due October 29, 1873, has been paid to said Eagan by W. C. Brooks;" but the bill does not say, that it was paid by her authority by said W. C. Brooks, or that he was her agent in paying it. She states, that nothing has been paid on the other four hundred dollar notes, four of which were not due then. The advertisement filed with the bill shows, that the credits on the sale were till the times stated in the bill as the times, when these four notes would become due. No persons were made defendants to this bill except Swan, the trustee, and David Eagan. Copies of the deed and deed of trust above stated and of the acknowledgments on them were filed with the bill as a part thereof; and the bill was sworn to.

To this bill David Eagan filed his answer, also sworn to, at the April rules, 1875. In it he says, that at his request since the filing of the bill H. C. McWhorter has corrected the certificate of the acknowledgment of his wife, Mary F. Eagan, by endorsing on it an acknowledgment in due form by her, which acknowledgment now appears on the deed, and which was ante-dated, the date inserted being October 3, 1872, which was the date of the first acknowledgment. This certificate is on the original deed filed with the bill, having been put there since the bill was filed; and the answer asks, that this certificate may be regarded as a part of his answer. It is also stated in this answer, that a similar correction of the erroneous certificate of A. Cunningham, recorder, had in like manner been made on the deed of trust; but the record does not show this to be true; and it can

hardly be true, as A. Cunningham was no longer recorder, when this bill was filed. This answer also states, that "the respondent retained his vendor's lien in his deed to the complainant," which he asks the court to enforce according to its terms. The answer further states, that "he assigned to Wm. B. Brooks for full value one of the notes for four hundred dollars, and that it is unpaid but is held by said Wm. B. Brooks as his own property." This assignment, the answer says, was made, when Wm. B. Brooks was negotiating for the purchase of this house and lot of Mrs. Catharine McMullen, but the purchase was never consummated.

The answer then in a very unintelligible manner says: "The next note was paid leaving the six last notes of four hundred dollars each unpaid." The answer prays, "that the court will appoint a commissioner to sell said house and lot for the payment of his vendor's lien retained in the deed." By the "next note, which was paid," is meant obviously the two hundred dollars note, which was payable sixty days after its date and was dated October 29, 1872. This is clear, as the answer expressly states, that all the notes for four hundred dollars each were unpaid. Why this two hundred dollars should be called the "next note," it is difficult to conceive, unless it meant, that it was the next one due after the transfer of the four hundred dollars note to W. B. Brooks. But however blunderingly this may be expressed, there can be no doubt, that the note, which the answer intended to state was paid, was the two hundred dollars note; and this appears from the answer itself.

At the court in May, 1875, Wm. B. Brooks, the party named in this answer, appeared and tendered an answer to the bill, though his name was not mentioned in the bill, and he was made no party thereto; but the entry on the record is: "This day came the complainant by his counsel, and thereupon came the defendant, Wm. B. Brook, by his counsel and tendered his separate answer to the complainant's bill; and there being no objection thereto, it is ordered, that the same be filed; and the complainant replied generally to said answer." The answer itself begins as follows: "Wm. B. Brooks asks to be made a party defendant and for answer, says, that he holds by assignment from D. Eagan for value the

first four hundred dollars note which is a lien upon the property named in the bill; that the said note is due and wholly unpaid. Respondent asks, that the house and lot be sold to pay the same. All the allegations in the bill charging its payment are untrue." This answer is sworn to.

W. C. Brooks, also who was no party to the cause but is merely stated in the bill to have paid to Eagan this note, filed his answer, which was also sworn to, in which he says, that he has no interest in the suit; that he merely as agent for his son W. B. Brooks purchased this note of D. Eagan, which she endorsed and assigned to him.

The complainant also filed a special replication to the answer of W. B. Brooks, in which she denies, that he was the owner of this note, and alleges, that it is fully paid off and discharged, but does not say, that it was paid by her or by any agent of hers. She also filed a special replication to the answer of D. Eagan, in which she says, that the additional certificate of the notary-public did not render his deed, so far as it conveyed the dower-interest of his wife, valid, and claims, that he is not entitled to the affirmative relief which he asks. These special replications were filed February 3, 1876.

On June 3, 1876, the cause was heard on these pleadings: and the court "was of opinion, that the deed from D. Eagan and wife filed in this cause it now properly acknowledged." (There appeared, then on the back of said deed an acknowledgment of it by D. Eagan and Mary F. Eagan, his wife, in proper form, which acknowledgment was again formally and properly made before the clerk of the county court of Kanawha on January 11, 1875, as appears by the endorsement now on said deed.) And the court ordered the said deed to be delivered to the clerk of the Kanawha *circuit* court for record in his office. Thus another blunder was committed. Doubtless the county court of Kanawha was meant. The court was also of opinion that the house and lot in said deed named were liable to the defendants D. Eagan and W. B. Brooks, his assignee, for the two thousand four hundred dollars of unpaid purchase-money, naming the times the various portions of it fell due; and that the house and lot were liable to be sold for the four hundred and eighty-eight

dollars then due to W. B. Brooks and the nine hundred and ninety-four dollars then due D. Eagan; and it was decreed, that unless Catharine McMullen or some one for her did pay the same within ninety days from the rising of the court together with the costs of the suit, T. B. Swan as special commissioner should after proper advertisement specified and on proper terms specified sell the same. The decree closes by saying, that he is "not to execute the same, until he has given bond before the clerk of this court in the penalty of one thousand dollars for the faithful performance his duties as such commissioner according to law.

A sale was made under this decree and a very imperfect report of the sale was made, which as well as the report itself was excepted to both by Wm. B. Brooks and by Catharine McMullen and on January 11, 1878, the court sustained these exceptions and set aside the sale and ordered the special commissioner to again execute the decree of sale. The first sale was made to D. Eagan for one thousand five hundred dollars. A second sale was made for the same price. It was not knocked down by the commissioner till he had offered on three several occasions by adjournments, when, no better bid being made, it was knocked down at one thousand five hundred dollars to J. M. Payne and S. C. Green. This sale was excepted to by Catharine McMullen for inadequacy of price, and six affidavits were taken to show the inadequacy of the price and four to show, that it was an adequate price. The court by its decree of June 8, 1878, confirmed this sale, ordered a deed to be made to the purchasers and awarded a writ of possession of the property to be executed by the sheriff, and a deed to be made to the purchasers; and the court reciting, that its attention was brought to the fact, that there were unpaid taxes on the property, directed the special commissioner to pay the same. During the same term of the court however this decree was set aside with the consent of the purchasers as improvidently made; and James H. McMullen having made an advanced bid of one hundred dollars, the sale was set aside. Against this action of the court D. Eagan protested and filed his affidavit in the cause, which was considered by the court in making this decree. This affidavit states, that Catharine McMullen has no prop-

erty real or personal except this house and lot; that it has been sold for delinquent taxes, and unless the sale, which had been made by the commissioner, was confirmed, he, D. Eagan, has no means of paying these delinquent taxes and so claiming this property; and that if the sale is confirmed, the decree may be made with his consent releasing her from all the residue of the debt, and thus she will realize more than the one thousand six hundred dollars, the bid of James H. McMullen.

A third sale of this property was then made by the commissioner of sale for one thousand six hundred and forty-five dollars to Mrs. E. V. Oakes, who was the highest bidder; and it was reported to the court by the commissioner of sale. She was also reported to have complied with the terms of sale. On her bonds for the deferred payments the commissioner of sale reports, that W. J. Oakes and E. S. Irwin were her sureties. This sale was again excepted to by Catharine McMullen because of the inadequacy of price, and because the commissioner had not given the bond required by the order of sale; but it now appears by the record before us, that this bond had been given on the — day of ——. The court overruled these exceptions and confirmed this report and sale by the decree of December 20, 1878; but the decree falsely recites: "That it appeared to the court by said report, that W. J. Oakes was the purchaser at the price of one thousand six hundred and forty-five dollars, and that he had complied with the terms of sale." The court also decreed, that an *habere facias possessionem* be awarded him, and that the sheriff do put him in possession of the said house and lot within thirty days from the rising of the court.

An appeal and *supersedeas* were allowed to this decree as well as to the decree directing the sale in the petition of Catharine McMullen.

W. A. Quarrier and W. S. Laidley for appellant, cited the following authorities: 2 Munf. 289; Code ch. 125, § 57; Cooper Eq. Pl. 42; *Id.* 45; Mit. Chy. Pl. 37; Cooper Eq. Pl. 85, 86; Story Eq. Pl. § 393; Sandf. Ch. N. Y. 210; Mit. Ch. Pl. 80; Story Eq. Pl. § 389; 1 Eden Injunc. 190; 3 Atk. Ch. 812; 19 E. L. & Eq. 325; Lubes Eq. Pl. 142, note 1 and

308, note 1; 17 How. 130; 8 Cow. N. Y. 361; Story Eq. Pl. § 401; Danl. Ch. Pr. 1551, notes 1 and 9; 19 N. Y. 529; 1 Wall 5; 23 Ala. 219; 12 Mich. 94; 14 Vt. 208; 24 Vt. 181; 3 Cain. R. 19; 9 Wall. 807; 14 W. Va. 637; 3 J. J. Marsh. 262; 6 Daud 186; 8 Cow. 361; 13 Ga. 478; 23 Ala. 219; 19 N. Y. 529; Adams Eq. 769, note 3; 2 Rob. Pr. (old) 318; 1 Danl. Chy. Pl. & Pr. 334 *et seq*; 3 W. Va. 11.

J. W. Kennedy and *Watts & McCorkle* for appellees, cited the following authorities: 2 Danl. Chy. Pr. 1550; Langdell Eq. Pl. 78, 80; Story Eq. Pl. 392; 2 Danl. Chy. Pr. 1549, note 1; 10 W. Va. 128; 8 Gratt. 580; 10 Gratt. 557; 3 W. Va. 672; 6 W. Va. 336; 1 Danl. Chy. Pr. 246 *et seq.*; *Id.* 382, note 2; 14 W. Va. 334; 3 W. Va. 163; 7 W. Va. 567; Bisp-ham Eq. 437; 2 Call. 184; 7 W. Va. 707; 2 Danl. Chy. Pr. 1463; *Id.* 1461, note 2; 10 W. Va. 122; 9 Gratt. 579; Code ch. 134, § 6; Kelly's Rev. Stat ch. 160.

T. B. Swann for appellees.

GREEN, JUDGE, announced the opinion of the Court:

The first error assigned is, that on the bill of injunction and the answer of the defendant, David Eagan, the injunction should have been perpetuated, and the complainant should have been decreed the payment of the costs incurred by her, and that the allegations in the answer of David Eagan, on which he asked affirmative relief, were not such allegations, as could have sustained a cross-bill, and the court should have dismissed the same, so far as it sought affirmative relief. The injunction granted not only enjoined the sale already advertised but also enjoined the trustee and the defendant, David Eagan, from again offering this house and lot for sale. This injunction could have been properly perpetuated, only in case the deed of trust was fatally defective as a deed.

The defect claimed to exist in it was, that it was not properly acknowledged by the complainant, a married woman living with her husband. The Code of West Virginia chapter 73, § 4 and 6, provides in substance, that a deed signed by a married woman shall operate to convey from the

wife her right of dower and all her interest of every nature in the land, when it has been properly admitted to record both as to her and as to her husband and not till then; and that before it can be admitted to record, she must appear before a proper officer and having been examined by him privily and apart from her husband and having had the deed fully explained to her, she must acknowledge the same to be her act and declare, that she had willingly executed the same and does not wish to retract it, and all this must be reduced to writing and put on record with the deed.

The language of this fourth section seems clearly to indicate, that the privy examination of the wife separate and apart from her husband and the full explanation of the deed to her, must precede the acknowledgment of the deed by her. Our courts have always required a substantial compliance with all the requisites of this law. The privy examination must take place. *County v. Geiger*, 1 Call. 193; *Harvey v. Pecks*, 1 Munf. 518. So the certificate must show, that the deed was fully explained to her. *Harston v. Randolph*, 12 Leigh 495. It must also show, that she declared, that she did not wish to retract it. *Grove v. Zumbro*, 14 Gratt. 501; *Linn v. Paton*, 10 W. Va. 198; *Bartlet et al. v. Fleming et al.*, 3 W. Va. 163. So it must show, that she declared, that she had willingly executed the same. *Bartlet et al. v. Fleming*, 3 W. Va. 163; *Leftwich v. Neal*, 7 W. Va. 569. These decisions as well as the authorities in other States establish the proposition, that the certificate must show that the statute-law has been in all respects substantially complied with. See authorities cited in *Laughlin Bros. v. Freame et al.* 14 W. Va. 335.

These decisions, in their spirit, seem to require us to declare null the deed of a married woman unless the certificate shows, that the acknowledgment of it was made after she had been examined privily and apart from her husband and had the deed fully explained to her. If she, as in the execution of the deed from Catharine McMullen to Swan, trustee, acknowledges the deed with her husband, though it be afterwards fully explained to her and she declares she had willingly executed the same and does not wish to retract it, still such deed must be held to be a nullity. We can not regard

as unimportant the requirement of the statute, that the acknowledgment by a married woman of a deed should be made separate and apart from her husband, and after the deed has been fully explained to her. If the certificate as in this case shows, that the deed was acknowledged by the husband and wife together though it shows, that there was a subsequent privy examination and a compliance with every other requisite of the statute, yet, such certificate is fatally defective and the deed is void so far as it operates to convey any interest of the wife. These views are sustained by authority. See *Allen and wife v. Shortridge, &c.*, 1 Duval (Ky. R.) p. 34, and *D. D. Dewey et al. v. Joseph Campau*, 4 Gibbs, (Mich. R.) p. 565.

It follows from these principles, that the deed of trust executed by J. H. McMullen and Catharine McMullen, to T. B. Swan, trustee, dated October 29, 1872, was inoperative to convey the house and lot of Mrs. Catharine McMullen, as the certificate of her acknowledgment of it, on its face shows, that she acknowledged it for recordation in the presence of and jointly with her husband, instead of when she was separate and apart from him and after it had been fully explained to her as the statute-law requires. For the same reason, the deed from D. Eagan and his wife Mary F. Eagan, dated the same day, conveying this house and lot to Catharine McMullen, was inoperative to convey or bar the contingent dower interest of Mary F. Eagan in this house and lot. Nor was this defect caused by the officer, who took this acknowledgment, re-writing this certificate on the back of the deed, and dating this new certificate as of the date of the deed and writing it in the proper form showing, that the acknowledgment of it was not made by Mary F. Eagan in the presence of her husband. For it is not the fact that the privy examination and the acknowledgment by the wife of the deed, when separate and apart from her husband are alone sufficient to make the deed of a wife valid against her. A record of it must be made, and when made, like other records, it is a verity and cannot be corrected or changed afterwards by the officer. It has been held, that it can not afterwards be corrected and made good, if not originally recorded in a proper form by the formal judgment of a court. See *Elliott*

et al v. Piersol et al., 1 Peters R. p. 329. But the formal acknowledgment of this deed, in the proper manner, made by D. Eagan and Mary F., his wife, nearly three years afterwards, on January 11, 1875, before the clerk of the court for Kanawha county, and his endorsement of this new acknowledgment in proper form on this deed cured this defect and made this deed valid against her; because it was equivalent to the re-execution of the deed, or the making of a new deed conveying this house and lot in the proper manner.

We do not understand, that the law as we have stated it, has altered or affected our acts concerning married women. See chapter 66 of Code of West Virginia, p. 417. The third section of this act provides, that "no married woman unless she is living separate and apart from her husband, shall sell and convey her real estate, unless her husband joins in the deed or writing by which the same is sold or conveyed." The apparent meaning of this is, that it was not intended by chapter 66 of the Code of West Virginia to make any change in the manner, in which the real estate of a married woman whether her separate estate or not, was to be conveyed.

It would be unreasonable to construe this section as authorizing a married woman to convey her separate real estate, simply by her husband joining with her in the deed without any privy examination of her, for we would then construe this section as taking away from married women a protection against the undue influence of husband, which had always been afforded her by our law and which protection the courts had steadily upheld in its full vigor. It cannot be supposed, that the Legislature intended to do this, as the very object of this chapter 66 of our Code p. 497, was to give to married women increased protection of their property against both the husband and his creditors; an effect, which to a large extent, would be defeated if we were to construe this third section as dispensing with the privy examination of the wife when she conveyed her real estate, if it was her separate property.

There is then, as we have construed this third section of chapter 66 of our Code p. 448, nothing in this act which would render valid this deed of trust executed by Catharin

McMullen to Thos. B. Swan, trustee, but which was never properly acknowledged. The construction of this third section of chapter 66 of our Code, in this respect, has not been heretofore made by our Court. It was considered in the case of *Radford v. Carwyle*, 13 W. Va. p. 572, but the decisions of the true interpretation of this section in this respect, was then waived by the Court, it not being necessary to the decision of that case. The deed of trust executed by Catharine J. Mullen being in operation it is claimed, that the injunction should have been perpetuated and that she should have been decreed her costs. This would follow unless the answers which prayed affirmative relief can be regarded as a cross-bill. They are quite informal, but under our Code must be regarded as the equivalent of a cross-bill provided, that the facts stated in them are such as would, before the passage of our Code, have been as a proper basis for a cross-bill.

Now a cross-bill is a mere auxillary suit, a dependency of the original. It may be brought by the defendant against the plaintiff in the same suit or against other defendants or against both, but it must be touching the matters in question in the bill; as when a discovery is necessary or as when the original bill is brought for a specific performance of a contract, which the defendant at the same time insists ought to be delivered up and canceled; or when the matter of defense arises after the cause is at issue. See *Cross v. De Valle*, 1 Wallace 14; *Gallatin v. Cunningham*, 8 Cow. 361; *Slason v. Wright*, 14 Vt. 208; *Rutland v. Paige et al.*, 24 Vt. 181; *Andrews v. Kibbee*, 12 Mich. 94; *Draper v. Gordon*, 4 Sandf. Ch. R. 225.

The question then is, was this cross demand in the answers in this case, on which they asked affirmative relief, properly speaking, touching the matters in question in the bill? Do these answers operating as a cross-bill under our statute introduce other matters distinct from those stated in the original bill, and on which it was based, or are these matters, on which this affirmative relief is asked confined to the matters involved in the original bill? What is sought in these answers by way of affirmative relief, is the enforcement by the court against the plaintiff, of her notes given for the purchase-money of the house and lot named in the bill, by reason of a vendor's lien having been retained in the deed to her

to secure the payment of these notes. Was this introducing new matters distinct from those stated in the bill and on which the bill itself was based?

To determine this, we must examine the bill and determine about its full scope and object. Had it been simply an injunction suit either to prevent the sale of the complaint's house and lot, under the deed of trust she had given, because it had been insufficiently acknowledged by the plaintiff, a married woman, or because it had not been properly advertised, it would seem clear on the principles laid down and on these authorities, that the defendant, David Eagan, could not in a cross-bill or under our statute by his answer in the nature of a cross-bill, have asked the court to have this house and lot sold by its commissioner, because of a vendor's lien he had retained on this property. For in such case, it would have been introducing into the suit new and distinct matters not embraced in the original suit. But was this the full scope and object of the bill? If this had been its sole object there was neither necessity nor propriety in alleging in it, that the vendor's lien was retained in the deed to the plaintiff to secure the same identical notes, which were secured by the deed of trust had it not been fatally defective.

The bill however refers to the deed conveying the said house and lot to the plaintiff, and states its contents and files a copy of this deed as a part of the bill, and it further says: "She refers the court to the fact, that the *vendor's lien* was expressly reserved in said deed to secure the deferred installments of the purchase-money; and if said deed had been properly executed by the wife of David Eagan, the said vendor's lien would be a valid lien for the purposes intended. But, notwithstanding the reservation of the vendor's lien in said deed, the said David Eagan required your oratrix and her husband to give him a deed of trust upon said property to secure the payment of said deferred installments, which were already intended to be secured by the reservation of the vendor's lien in the deed delivered to her by David Eagan."

The bill declares, that the wife of David Eagan did not properly acknowledge this deed, and that thus her title to this property was incomplete and imperfect as the wife of David Eagan had in it a contingent right of dower. General

relief is asked in this bill, and under this prayer and the allegations in the bill, the court might in this cause have properly decided, whether this acknowledgment of the wife of David Eagan was binding on her, and whether the plaintiff's title to this property was imperfect and to what extent imperfect. It was also claimed in this bill, that one of the four hundred dollars purchase-money notes had been paid off, but was still claimed to be due and this could also have been properly enquired into by the court, in this cause, and a credit directed to be given on these purchase-money notes for whatever have been paid, and also the proper abatement to be made from them for the contingent right of dower of the wife of David Eagan, if the court decided that she had such contingent right of dower in this house and lot. If we are right about the scope of this bill and the subjects of controversy involved in it, then it would follow, that an enquiry was involved in this suit as to the validity or the extent of the validity of this vendor's lien named in the bill, and as to how much of the purchase-money secured by it could be enforced. Therefore, a cross bill asking the enforcement in full of this vendor's lien was proper to be filed, as it did not introduce into the suit new and distinct matter, but only asked relief in reference to a matter stated in the bill, and which it was a part of the object of the bill to have enquired into by the court in this suit.

The next enquiry is, whether the decree of June 3, 1876, was or was not erroneous in adjudging, that there was due from the plaintiff Catharine McMullen to W. B. Brooks, as assignee of David Eagan, the first note of four hundred dollars with interest from October 29, 1872, by the assignment of said note by David Eagan. This is contradicted in the special replication of the plaintiff to the answer of W. B. Brooks, and it is claimed that the pleadings show that, this note is paid. The deed to the plaintiff as well as the deed of trust from her, secures this note and it is set out in these deeds as an existing and unsatisfied debt. This acknowledgment of this debt throws on the plaintiff the burden of proving, that it has been paid, and not a particle of evidence was produced to show that it was paid; and its assignment to W. B. Brooks for value, is admitted in the answer of David

Eagan the payee in this note. It must therefore be regarded as due despite the bungling statement in the answer of David Eagan.

The statement of the case showed, that what he really admitted in this answer to be paid, was only the two hundred dollar note due to the plaintiff sixty days after the sale, and that none of these four hundred dollar notes had been paid. It is said that Wm. B. Brooks was no party to the cause. It is true he was not even named in the bill but the answer of David Eagan states, that he was the owner of the four hundred dollar note, which the bill in a loose way said was paid; and of course the proper mode of making him a party, was after this answer was filed, to have required him to be made a party by an amendment of the bill. It is also true, that no one could properly be made a defendant to a cross-bill except persons, who were parties to the suit as plaintiffs or as defendants. "New parties cannot be introduced into a cause by a cross-bill. If the plaintiff desires to make new parties he amends his bill and makes them. If the interest of the defendant requires their presence, he takes the objection of *non-joinder*, and the complainant is forced to amend, or his bill is dismissed. If, at the hearing, the court finds that an indispensable party is not on the record, it refuses to proceed. These remedies cover the whole subject, and a cross-bill making new parties is not only improper and irregular, but wholly unnecessary." See *Shields et al. v. Borrow*, 17 How. 145. This obviously proper course was not pursued in this case.

The answer of David Eagan sworn to showed, that W. B. Brooks was a necessary party to the cause; that he had not been made so by the bill, and without any amended bill being filed making him a party, he files his answer claiming to be the owner of one of the notes stated in the bill to have been paid, and denying that any part of it was paid. This was so irregular, that had it been objected to in the court below, a decree in favor of W. B. Brooks must have been reversed by this Court. But it was in no manner objected to, on the contrary the record shows what may be considered as implied assent by all parties to this irregular proceeding. The entry made on the record when this improper answer of W.

B. Brooks was filed states, that the plaintiff by his counsel, was then present and that no objection was made to this answer and thereupon it was ordered to be filed and the plaintiff replied generally to it. She afterwards filed a special replication to this answer, but in no manner objected to the gross irregularity of any answer being filed by W. B. Brooks. He was thus treated throughout in the court below as if the bill had stated, that he claimed to be the owner of the four hundred dollar note which the bill alleged was paid, and as if he had been made a defendant in the court below. This we think debars the plaintiff from alleging in this Court, that he was not a proper party to the suit; and so regarding him there is no error in the decree of sale of June 30, 1876.

The court in that decree properly regarded as curing all defects, the acknowledgment by the wife of David Eagan of the deed to the plaintiff made on the 11th day of January, 1875, before the clerk of the county court of Kanawha; his certificate made on said deed showing, that it was again properly acknowledged by David Eagan, and further showing, that his wife personally appeared before said clerk, in his office, and was by him examined privily and apart from her husband; that the deed was fully explained to her; that she acknowledged it to be her act and declared that she had willingly executed the same and did not wish to retract. This was equivalent to the execution of another deed by them and its due acknowledgment and recordation, and it cured all defects which existed in the original deed.

This decree concludes, that "commissioner Swan is not to execute this decree, until he has given bond before the clerk of this court in the penalty of one thousand dollars for the faithful performance of his duties as such commissioner according to law." This was an unnecessary provision. The law only requires, that the commissioner should give bond with good security before the clerk of the court, faithfully to perform the duties of his office, before he collects any money under a decree of sale; and this should properly have been the provision of his decree, as a commissioner of sale may properly make such sale without giving any bond, though he can not be authorized to collect and can not collect any portion of the purchase-money, without giving such bond. But,

in this case no evil resulted from this improper requirement of the court, for it now appears by the record as amended by the agreement of parties, that this bond was given and acknowledged before the clerk by the parties and approved on August 29, 1876, which was prior to any sale of the property by the commissioner. The exception to one of the sales because this bond had not been given, had really no foundation in point of fact, on which to rest.

The court did not err in refusing to confirm the first report of sale, because it was utterly defective in showing how the sale had been made or when, or that the terms of sale had been complied with. The court it seems to me, ought not to have set aside the second sale because of the advanced bid of one hundred dollars, because it was an inadequate advanced to justify a re-sale, the price at which it had been sold being one thousand five hundred dollars, and because Daniel Eagan by an affidavit filed showed, that he could if the sale was confirmed, have released to the plaintiff all demands against her for the residue of his debt, beyond what he would have received from this one thousand five hundred dollar sale; and this would have been more beneficial to the plaintiff than a sale of the property at more than one thousand six hundred dollars.

The affidavits filed did not show, that one thousand five hundred dollars was such an inadequate price as justified the court in setting aside this sale. It is true, that five or six years before the plaintiff had bought this house and lot for three thousand four hundred dollars, that six witnesses made affidavit, that they were well acquainted with the house and lot and believed they were worth two thousand five hundred dollars. On the other hand three other witnesses, as well as David Eagan swear, that they know the property well and they believed one thousand five hundred dollars was its full value. One of these was a person, who wished to purchase but would not bid at the sale more than one thousand four hundred and five dollars, which he regarded as its full value. This together with the fact, that the commissioner of sale had made at different times, as his report shows, great efforts to sell this property at the highest price he could get, and had postponed the sale to different days to get a better bid if

possible, and did not knock it down till he had thus offered it there several times, and that at last he got no greater price offered at this second sale than he did at the first, ought to have prevented this sale from being set aside for inadequacy of price. At the third sale this property brought one thousand six hundred and forty-five dollars and the sale was properly confirmed by the court.

There was however a blunder on the face of the decree of December 20, 1875. The commissioner of sale reported, that the sale had been made to Mrs. E. V. Oakes for one thousand six hundred and forty-five dollars. But this decree says, "it appearing to the court by said report that W. J. Oakes was the purchaser at one thousand six hundred and forty-five dollars it was ordered, that the sheriff put him in possession of said property. This was apparently a clerical error, the name of W. J. Oakes being inserted in the decree as the purchaser named in the report of sale by the commissioner, when in fact Mrs. E. V. Oakes was the purchaser and had complied with the terms of sale. But this error should have been corrected by motion under the 5th section of chapter 135 of Code of West Virginia, p. 638. No such motion having been made, it constitutes no ground for reversing said decree, but we may correct said decree and affirm the same.

We will not make this correction in this Court, because though apparently it is a mere clerical error yet, it is possible that there is some agreement between the purchaser, Mrs. E. A. Oakes, and her security W. J. Oakes, whereby this property is to be conveyed to him instead of her, and he then substituted as purchaser. If this happens to be the case, there can be no objection to carrying it out by a proper decree of the court; but of course the decree on its face should show, that with the consent of E. A. Oakes, W. J. Oakes had been substituted in her place as the purchaser, and proper provisions should be made for enforcing the deferred payments of the parties for the land sold; and the commissioner should be required, before he collects the deferred payments of the purchase-money, to give a bond in a larger penalty than one thousand dollars.

The decrees appealed from should therefore be affirmed,

and the appellant should pay to the appellees their costs in this Court expended and thirty dollars damages, and this cause should be remanded to the circuit court of Kanawha with instructions to correct the decree of December 20, 1875, so as to substitute in it the name of Mrs. E. V. Oakes, in lieu of W. J. Oakes, unless by her consent entered of record, he be substituted for her as the purchaser of said house and lot; and with further instructions to proceed with the case according to the rules governing courts of equity and especially, that the court require of the commissioner of sale, or of any other person whom it may authorize to collect the deferred payments for the said house and lot, a bond in the penalty of one thousand five hundred dollars to be given before the clerk of the circuit court of Kanawha, conditioned according to law.

JUDGES JOHNSON AND HAYMOND CONCURRED.

DECREES AFFIRMED. CAUSE REMANDED.

CHARLESTON.

HUTTON *et al.* v. LOCKRIDGE *et al.*

Decided February 5, 1883.

(*SNYDER, JUDGE, Absent.)

1. When a process of *supersedeas* issued by the clerk of the Supreme Court of Appeals states in accordance with the transcript of record, that the decree superseded was rendered by a certain circuit court on a certain day, and no decree was rendered by the said court on that day, but a decree was rendered on the day succeeding the one named in the process, and no other decree had been rendered in said cause, which could be supposed to be the one, which the Appellate Court had superseded, such process is not void and inoperative. (p. 259.)
2. If after such process has been served on a special receiver, who by such decree had been authorized to rent out the real estate of the defendant, he proceeds to rent the same but announces publicly on the day of the renting, that if the Appellate Court on being applied to should hold such process effective, he would return to

*Judge S. absent on account of sickness.

the renter his bond and repay his cash-payment and not report the renting to the circuit court, and the Appellate Court is satisfied, that he always intended to make such application to it to ascertain, whether such process was effective, before he placed the renter in possession of the property, and before he reported the renting to the court, it will not punish such special receiver for a contempt of the court because of such disobedience of its lawful process, the act of disobedience not having been consummated so as to injure any one, and no contempt being intended. (p. 260.)

3. But if the special commissioner in such a case delays to make an application to the Appellate Court to ascertain, whether such process was effective, and the defendant moves the court to issue a rule against him for contempt, the court, though declining to punish him for contempt, will adjudge against him the costs of the proceedings. (p. 261, 262.)

A rule for contempt against John Osborne, special receiver in a cause then pending in the circuit court of the county of Pocahontas, wherein J. C. Hutton and others were plaintiffs and J. T. Lockridge and others were defendants.

GREEN, JUDGE, furnishes the following statement of the case:

On April 29, 1879, the circuit court of Pocahontas rendered a decree in three causes, which were heard together, one of which was the cause of J. C. Hutton and others, plaintiffs, against James T. Lockridge and others, defendants. By this decree it was ordered among other things, that, unless the said James T. Lockridge should within thirty days pay to certain creditors certain debts and the costs of their suits, certain persons appointed commissioners should after a specified advertisement sell certain lands of the said Lockridge to pay the same.

On the petition of said Lockridge, on September 8, 1879, an appeal with *supersedeas* to this decree was awarded by a judge of this Court, and the *supersedeas* was perfected by the giving of the required bond. At a term of the circuit court of Pocahontas county, which commenced on October 16, 1882, while this cause was on said appeal and *supersedeas* to said decree of April 29, 1879, undecided in this Court, said circuit court rendered a further decree in said cause of *J. C. Hutton et al. v. James T. Lock-*

ridge et al., whereby it was ordered, that John Osborne as a special receiver after a specified advertisement should rent out said lands of the said Lockridge for one year from March 1, 1883, so much to be paid in cash by the renter, as would pay the costs of such renting, and the balance on a credit of twelve months to be secured by bond with good personal security; and this special receiver was required to give such a bond with security, as the law requires. This decree was rendered on October 17, 1882, and was the only decree, which was rendered in said court at the said term commencing on October 16, 1882, or at any other time since said decree of April 29, 1879, which had been superseded.

On the 9th day of December, 1882, upon the petition of said Lockridge this Court granted an appeal and *supersedeas* to this decree rendered at the October term, 1882. The petition correctly describe this decree as rendered at the October term, 1882, of the circuit court of Pocahontas and in said cause; but it does not specify on what day it was rendered, though with this exception the description is correct. Upon the granting of said appeal and *supersedeas* by this Court, the clerk of this Court on December 19, 1882, issued a summons against the appellees in said appeal, and in this summons he describes the decree appealed from and superseded as rendered by the circuit court of Pocahontas county on the 16th day of October, 1882, in said cause. The time when this decree was rendered was taken from the transcript of the record, which accompanied the petition for an appeal and *supersedeas*, which had been presented by said Lockridge to this Court. The clerk of the circuit court of Pocahontas having commenced this transcript as proceedings, "at a circuit court held for the county of Pocahontas on the 16th day of October," carelessly omitted to state when this decree was rendered; but went on immediately after this, heading to copy the decree, which states, that it was rendered "this day." The clerk of this Court therefore justly concluded, that this decree was rendered on the 16th day of October, 1882, and so described it in his summons. This summons was served on John Osborne, said special receiver, on the 30th or 31st of December, 1882.

Before this summons was served on him, the required

supersedeas bond had been executed and approved. This bond correctly describes the decree, which had been superseded, as a decree "rendered at the October term, 1882; of the circuit court of Pocahontas." It does not state, on what day it was rendered, but it corresponds with the petition for the appeal and *supersedeas* on which the court had awarded a *supersedeas*. But, though served with the summons, the special receiver, John Osborne, proceeded on January 2, 1883, to rent out said lands at a public renting pursuant to a notice to that effect, which he had made prior to the awarding of the *supersedeas*. He made known publicly on the day of the renting the fact, that he had been served with this process or summons issued by the clerk of this Court and said, that if this Court held this process or summons effective he would surrender the renter's bond, return his cash payment and make no report of the renting to the circuit court. After giving this notice he rented publicly these lands, took of the renter the cash payment and his bond for the residue of the rent pursuant to said decree of October 17, 1882.

On the 18th day of January, 1883, on the affidavit of James T. Lockridge, this Court issued a rule against John Osborne, the special receiver, to show cause why he should not be fined and attached for contempt of the process of this Court in renting the said lands after said process of this Court had been served upon him. This rule was returnable to this Court on the 20th day of January, 1883, at which time said John Osborne filed his answer on oath admitting in substance, that the facts of the case were substantially as above stated. The admissions in his answer and an affidavit of the clerk of the circuit court of Pocahontas county also filed, and the record and papers, which have been filed in this cause, when examined show, that all the facts which can have any bearing on the question, whether the said John Osborne should be fined and attached for a contempt of this Court in this matter, are as above stated.

In his answer he states, "that he verily believed the bond given by the appellant, James T. Lockridge, to pay all costs and damages by reason of an appeal from a decree rendered on the 16th day of October, 1882, would not be operative for any costs and damages, which might be sustained by reason

of the plaintiff in the circuit court causing to be executed a decree, which had not been appealed from or suspended." He also states, that "he as an officer of said circuit court was liable to be attached and fined for failing or refusing to obey its mandate; that as such officer he regarded it as his official duty to proceed to execute the decree of October 17, 1882, unless specifically suspended and, that it was not suspended by a *supersedeas* referring to a decree of October 16, 1882." He further states, that "he did not intend any contempt of this Honorable Court; that he acted as he believed he was in law bound to do and as the process of the court below directed him to do, and that he did not and would not willingly and knowingly abuse or contemn the process of this Honorable Court."

Dennis & Dennis for Lockridge.

Samuel Green for Osborne.

GREEN, JUDGE, announced the opinion of the Court:

This Court may issue attachments for contempt and fines summarily in cases of disobedience, by any person, to any of its lawful processes or orders. See Code of W. Va. ch. 147, § 27, p. 69, and *State of W. Va. ex rel. Mason v. The Harper's Ferry Bridge Company*, 16 W. Va. pages 875, 876. The *supersedeas* alleged to have been disobeyed by John Osborne, special commissioner, was confessedly a lawful process, but he claims in his answer that he did not disobey this process, because the *supersedeas* served on him commanded him not to execute a decree of the circuit court of Pocahontas county in the cause of J. C. Hutton and others, plaintiffs, against James T. Lockridge and others, defendants, rendered on October 16, 1882; and that in renting out the lands of Lockridge he did so under a decree in said cause of October 17, 1882, which decree had not been superseded. And it is argued by his counsel, that this *supersedeas* of this Court was wholly inoperative, null and void as there was no decree in said cause rendered on October 16, 1882, and the *supersedeas* on its face only superseded a decree rendered on the last named day.

The process on its face expressly superseded some decree rendered in this cause. It cannot therefore be a nullity as contended, unless the insertion in it of the wrong date when this decree was rendered makes the *supersedeas* so vague, that its meaning and purpose could not with any certainty be ascertained. If several distinct and substantially different decrees had been rendered in this cause, to any one of which the *supersedeas* of this Court would equally well have applied, and it could not be ascertained which of these several decrees the *supersedeas* was intended to operate upon, it is possible that the process issued by the clerk of this Court might be regarded as inoperative; though even then the far better and more prudent course for the person to pursue, who proposed to carry into execution any one of these decrees would have been, before so doing, to have applied to this Court to ascertain definitely what decree it intended to supersede; and even in that case, if without taking such precaution he proceeded to execute any of these decrees, he might incur the risk of being punished for a contempt of this Court.

In the case before us there can be no possible question as to the decree, which the process issued by the clerk of this Court on December 19, 1882, and served on John Osborne, the special receiver, intended to supersede. There was but a single decree in this cause, which was then in force; all others having been superseded by a former order of this Court and being then before this Court for review. Of course the *supersedeas* must have referred to some decree rendered in this cause since September 8, 1879, when this Court superseded all decrees in the cause prior to that date. The decree of October 17, 1882, directing the lands of the defendant Lockridge to be rented out by the special receiver, John Osborne, was the only decree which had ever been rendered in the cause after the decree of April 29, 1879, which had been superseded. It was therefore unquestionably the decree intended to be superseded by the process issued on December 19, 1882. Nor could the mistake in the process in reciting this decree as rendered on October 16, 1882, instead of October 17, 1882, render in any degree ambiguous the decree intended to be superseded. The special receiver,

John Osborne, must therefore have known, that it was the purpose of this Court by this process to supersede the execution of this decree of October 17, 1882. If he did know this, as must have been the case, it only remains to enquire whether or not he disobeyed this lawful process of this Court.

On January 2, 1883, as such special receiver under this decree of the circuit court rendered October 17, 1882, he rented out the real estate of the defendant, Lockridge, at public auction. But this renting he did not report to the court, and unless so reported it would be inoperative. He did then an act, which was the initiatory step in disobeying the lawful process of this Court and he is punishable therefore unless it clearly appears, that he injured no one and never intended to consummate this act of disobedience. This court may properly punish one, who has done anything in disobedience of its lawful process though he has not consummated his act of disobedience unless he can show, that he never thereby injured any one and never intended to consummate the act and make it operative. The excuses which he makes in his answer, that he was apprehensive that the circuit court might punish him if he did not execute the decree of October 17, 1882, and that he regarded the process of this court as a nullity as it superseded a decree said to have been rendered on October 16, 1882, when no decree was rendered on that day, are not valid excuses. He had no reason to apprehend, that the circuit court would punish him for not executing the decree of October 17, 1882, as that court must have known that this decree had been superseded by this Court. He must, therefore, be punished by this Court for his disobedience of the lawful process of this Court, unless we are satisfied, that he never injured any one thereby and never intended to consummate his act of disobedience, the first step of which he took by renting publicly the real estate of the defendant, Lockridge, on January 2, 1883.

Did he injure any one thereby or did he ever intend to consummate this act? He injured no one; as possession of the property was not to be given to the renter till some two months after the renting, and, when he rented this property, he publicly proclaimed, that he had been served with the process of *supersedeas* of this Court; and he stated, that if the

Court held this process effective he would surrender the renter's bond, return his cash payment and not report the renting to the circuit court. It seems to us but just to him to construe this conduct, as though he had announced his purpose of applying to this Court and ascertaining, whether it considered the process issued by our clerk as effective or as a mere nullity. And so construing his conduct, if he had followed this declaration up by applying to this Court a week afterwards, when it met on January 10, 1883, to ascertain whether this process was or was not held to be effective, we could not have held otherwise than that he never did at any time intend to consummate his act of disobedience, and we could not have punished him for a contempt of this Court. But he never did make any such application to this Court. On the contrary the defendant, Lockridge, after waiting more than a week after this Court commenced its session, by his counsel, applied to this Court for a rule against said Osborne, to show cause why he should not be fined and imprisoned for a contempt of this Court in disobeying its lawful process. It is to be presumed, that he took this course, because he did not believe that the special receiver, John Osborne, intended to make any application to this court to ascertain whether it regarded the process issued by our clerk and served on him as effective. He was justified in so doing on account of the unreasonable delay of the special receiver in making such application. As however it was known, that the session of this Court would last for at least two weeks after this rule was issued it seems to us, that it would be harsh in us to draw the conclusion, that the special receiver, John Osborne, did not intend during this term of this Court, to make this application to this Court to ascertain whether the process issued by our clerk was regarded by us as effective. As this may have been his intention we must hold, that he did not intend to consummate his act of disobedience to this Court and that therefore, he ought not to be punished by this Court for a contempt in disobeying the process of this Court. This process is, as we have seen, lawful and effective. The bond too, which has been executed by the appellant and which was required to be given before the *supersedeas* took effect is a valid bond, and furnishes to the

parties all the protection to which they are legally entitled. It does not describe the decree superseded as one rendered on October 16, 1882, as did the process, but correctly describes it as a decree rendered in said cause at the October term, 1882, of said court.

Though we decline to punish the special receiver, John Osborne for a contempt of this Court yet, as we have seen, his conduct has been such as to justify the defendant, Lockridge, in asking of this Court a rule against him; and therefore the defendant, Lockridge, must recover of him his costs expended in the prosecution in this Court of this proceeding; but the rule must be discharged.

JUDGES JOHNSON AND WOODS CONCURRED.

RULE DISCHARGED.

WHEELING.

WARD v. WARD *et als.*

Submitted June 6, 1882—Decided March 17, 1883.

(*WOODS, JUDGE, Absent.)

1. A commissioner's report, made in a cause rightly referred, on the face of which no error appears, will be presumed by the court as admitted to be correct by the parties, not only so far as it settles the principles of the account, but also in regard to the sufficiency of the evidence upon which it is founded, except in so far and as to such parts thereof as may be objected to by proper exception taken thereto before the hearing; and the court, at the hearing, is bound to observe this rule of equity practice. And it is error for the court, at the hearing, to remodel and restate the whole account stated in such report, and enter a decree on its own statement without reference to the account stated by the commissioner or the action of the parties in excepting or not excepting thereto. (p. 270.)
2. If in any case the court is not satisfied with the report of a commissioner in regard to matters not excepted to which might be affected by evidence *aliunde*, instead of remodelling the account on its own estimate of the evidence, it should re-commit the report with instructions indicating its opinion, so that the respective parties might have an opportunity of meeting any objection thus suggested. (p. 272.)

*Cause submitted before Judge W. took his seat on the bench.

21	262
37	213
21	262
38	678
21	262
40	165
40	622
21	262
42	635
21	262
44	17
44	235
21	262
47	372
21	262
48	660
21	262
49	660
50	343
21	262
54	643
21	262
55	119
21	262
57	62
21	262
58	332

3. The proper rule for computing interest, where partial payments have been made, is to deduct the payment from the aggregate sum of principal and interest, computing the latter to the date of the payment, and the balance forms a new capital on which interest is to be computed to the next payment; but the new capital must in no instance be more than the former, so that if the payment be less than the interest due, the excess of interest must not augment the remaining capital, because that would give interest upon interest, which would be unlawful. (p. 274.)

Appeal from and *supersedeas* to a decree of the circuit court of the county of Randolph, rendered on the 6th day of December, 1879, in a cause in said court then pending, wherein William L. Ward was plaintiff and Jacob G. Ward and others were defendants, allowed upon the petition of said plaintiff.

Hon. John Brannon, judge of the sixth judicial circuit, rendered the decree appealed from.

SNYDER, JUDGE, furnishes the following statement of the case :

In April, 1870, William L. Ward filed his bill in the circuit court of Randolph county against Washington G. Ward, alleging therein that upon an accounting had between him and the defendant, who is his brother, it was ascertained that the defendant was indebted to him in the sum of three thousand dollars; that he and the defendant, being the owners in fee of a tract of land lying about two miles from Huttonsville on the west side of the Tygart's Valley river in Randolph county, the defendant by his title-bond, dated October 13, 1857, sold his undivided interest in said land to plaintiff at the price of five thousand five hundred dollars; that by agreement the said indebtedness of three thousand dollars was accepted by the defendant as the down payment on said land and the receipt of that sum is acknowledged in the title-bond, and one thousand five hundred dollars of the balance of the purchase-money was to be paid on the 1st day of November, 1857, and the remainder of one thousand dollars on the 1st day of November, 1858, and the defendant bound himself to convey his interest in said land, by deed, when said deferred payments should be fully paid; that the said title-

bond was duly signed by the defendant and delivered to the plaintiff and he then took possession of the whole of said land and has held it as his exclusive property ever since; that at different times before, at, and soon after said deferred payments on the land became due he paid to the defendant and to his order on account thereof divers sums of money which in the aggregate paid and discharged the whole of said purchase-money; and that he has requested the defendant to execute to him a deed for his interest in the land but he has failed to do so. And the plaintiff prays the court to compel the defendant, by decree, to execute to him a deed according to the terms of said title-bond and for general relief. The plaintiff exhibited with his bill the title-bond therein referred to, and also an account of the items of the various payments alleged to have been made by him to the defendant on the said land.

The defendant answered said bill admitting the sale of the land, the execution of the title-bond and the terms thereof, as stated in the bill, but denying that the plaintiff had paid the purchase-money or any considerable part thereof as alleged. And he denies that the three thousand dollars, recited in the title-bond as having been paid, was in fact paid at the time or before said bond was executed, or that he was then or at any time previous thereto indebted to the plaintiff, or that any settlement was made between them whereby it was ascertained that the sum of three thousand dollars, or any other sum, was due from him to the plaintiff. He states that prior and subsequent to the date of said title-bond there were large unsettled accounts between him and the plaintiff arising out of mutual dealings, whereby the plaintiff became indebted to him in various large sums of money on account of cattle sold, cash loaned, work done, &c.; that some of the items of the plaintiff's account he admits to be correct, some he denies to be just and others he neither admits nor denies but calls for full proof of their correctness. He expressly charges that many of the items of the plaintiff's accounts are post dated so as to make the same speak as of a day subsequent to the date of the said title-bond, whereas many of them accrued before that date. The defendant, also, exhibits with his answer an itemized account of his charges and claims against the plaintiff.

The defendant having died the cause was revived against his three sons, Jacob G., Renick S. and Adam S. Ward, his devisees and heirs-at-law, and against the said Jacob G. Ward as his executor.

A great number of depositions were taken by both the plaintiff and the defendant. By the former to sustain the account of payments exhibited by him and to disprove many of the items charged against him by the defendant's testator; and by the latter to establish the items of the account exhibited by their testator against the plaintiff and to controvert the correctness of certain items of the plaintiff's said account. The record having thus become quite voluminous and the testimony being very unsatisfactory and conflicting as to many of the items of the respective accounts of the parties, the court by an order made April 30, 1878, referred the cause to a commissioner with directions "to raise and state an account between the plaintiff and the late Washington G. Ward, in which he shall charge the plaintiff with one thousand five hundred dollars as due the 1st of November, 1857, and the further sum of one thousand dollars due the 1st November, 1858, and shall allow the plaintiff all proper credits and payments, and report the true state of accounts between them."

The commissioner made his report and filed the same in May, 1879, ascertaining the aggregate balance of principal and interest due from the plaintiff to the defendant's testator, as of May, 12, 1879, to be one thousand eight hundred and fifty-two dollars and nineteen cents as per his statement of the account which is as follows:

"STATEMENT OF ACCOUNT.

"1857, Nov. 1.—To amount due by Wm. L. Ward to	
Wash. G. Ward. (See record).....	\$1,500 00
Interest from Nov. 1, '57, to Nov.	
11, '57.....	2 50
	<hr/>
	\$1,502 50
"1857, Nov. 11.—Cr. by amount paid Snyder.....	54 11
Balance due Wash. G. Ward.....	\$1,448 39
Interest on same to Oct. 11, '58.....	78 83
	<hr/>
Amount October 11, '58.....	\$1,527 22

"1858,	Oct.—Cash loaned Wm. L. Ward by Wash'n G. Ward.....	\$	200 0
	Total.....	\$1,727 2	
"1858,	" —Cr. by 2 horses by Ad. Ward.....	160 0	
	Balance due Wash'n G. Ward, Oct., '58.	\$1,567 2	
	Interest from Oct., '58, to Nov. '58.....	5 2	
	Amount	\$1,572 4	
"1858, Nov. 1.—	To amount due by Wm. L. Ward to Washington G. Ward. (See decree.)....	1,000 0	
	Total.....	\$2,572 4	
	Interest from Nov. 1, '58, to Nov. 1, '59.	154 2	
	Amount	\$2,726 7	
"1859, Nov. 1.—	Cr. by cash paid by Wm. L. Ward to Washington G. Ward.....	1,000 0	
	Balance due Wash'n G. Ward, Nov. 1, '59	\$1,726 7	
	35 head of cattle @ \$25.00.....	875 0	
	Cash loaned.....	10 0	
	Total.....	\$2,611 7	
	Interest on this sum from Nov. 1, '59, to Mar. 28, '60.....	63 9	
	Amount	\$2,675 7	
"1860, Mar. 28.—	Cr. by summering 30 head of cattle @ \$5.00 each	150 0	
	Balance due Wash'n G. Ward, Mar. 28, '60.....	\$2,525 7	
	Interest thereon from Mar. 28, '60, to Oct. 1, '60.....	76 6	
	Amount.....	\$4,602 3	
"1860, Oct. 1.—	Cr. by one mare by Ad.....	90 0	
	Balance due Wash'n G. Ward, Oct. 1, '60.....	\$2,512 3	
	Interest thereon to Nov. 1, 1860.....	12 5	
	Amount.....	\$2,524 9	
"1860, Nov. 1.—	Cr. by cash paid Jacob W. Marshall to Washington G. Ward.....	\$1,500 0	
	Balance due Wash'n G. Ward, Nov. 1, '60.....	\$1,024 9	
	To cash loaned.....	\$ 2 96	

		To services taking cattle to Pennsylv'na.....	\$50 00	52 96
		Total.....	\$1,077 90	
		Interest thereon from Nov. 1, '60, to Feb'y 1, '61.....		16 17
		Amount	\$1,094 07	
"1861,	Feb'y 1.—	Cr. by am't paid Wm. C. Price.....		39 22
		Balance due Washington G. Ward, to Feb'y 1, '61	\$1,054 85	
		Interest from Feb'y 1, '61, to Oct. 1, '61.		42 19
		Amount.....	\$1,097 04	
"1861,	Oct. 1.—	Cr. by 3 cattle by Ad. Ward.....		90 00
		Balance due Wash'n G. Ward, Oct. 1, '61.....	\$1,007 04	
		Interest from Oct. 1, '61, to Oct. 1, 1864,		181 27
		Amount.....	\$1,188 31	
"1864,	Oct. 1.—	Cr. by one horse by Ad. Ward.....		150 00
		Bal. due Wash'n G. Ward, Oct. 1, 1864.....	\$1,038 31	
		Interest thereon from Oct. 1, '64, to Oct. 1, '65.....		62 30
		Amount	\$1,100 61	
"1865,	Oct. 1.—	Cr. by amount paid Jacob G. Ward....		30 00
		Balance due Wash'n G. Ward, Oct. 1, '65.....	\$1,070 61	
		Interest thereon from Oct. 1, '65, to April, '68.....		160 59
		Amount.....	\$1,231 20	
"1868,	Apr. 1.—	Cr. by cash paid by A. Hutton.....		120 00
		Balance due Wash'n G. Ward, Apr. 1, 1868.....	\$1,111 20	
		Interest thereon from Apr. 1, '68, to May 12, '79.....		740 90
		Amount due Washington G. Ward May 12, 1879.....	\$1,852 19"	

Both the plaintiff and the defendants excepted to said report and account. The plaintiff's exceptions are as follows:

"The complainant excepts to the report of Commissioner Jones filed in this cause for the following reasons:

"First. Because the commissioner in computing the interest upon balances has compounded it in the following in-

stances, viz: On two thousand five hundred and seventy two dollars and forty-four cents from 1st of November, 1858, to 1st of November, 1859, instead of on the sum of two thousand five hundred and sixty-seven dollars and twenty-two cents; and on one thousand and thirty-eight dollars and thirty-one cents from 1st October, 1864, to 1st October, 1865, instead of one thousand seven dollars and four cents for same time; and on one thousand one hundred and eleven dollars and twenty cents from 1st April, 1868, to May 12, 1879, instead of on the sum of one thousand and seventy dollars and sixty one cents for same time.

“Second. Because a credit was not allowed for so much of the amount claimed by the plaintiff paid Caleb Boggess to the defendant, W. G. Ward, in his answer, admitted the plaintiff entitled to a credit for, viz., thirty-seven dollars and fifty cents, as of the 30th October, 1860.

“Third. Because no credit was allowed to the plaintiff for the sum of two hundred and fifty dollars of the 13th October 1858, paid to J. M. Crouch, admitted by W. G. Ward to A. Hutton, witness, in 1861, to have been paid, and not denied by his answer afterwards filed.

“Fourth. Because no credit was allowed to the plaintiff for the item of sixty-five dollars, or any part of it, which the defendant in his answer distinctly admits to be correct.

“Fifth. Because no credit was allowed to the plaintiff for the sum of one thousand dollars paid in November, 1857, and which was one of the items of the account presented to W. G. Ward for settlement by A. Hutton in 1869, and which was not then denied or objected to, as was the case with other items of the account, and which, by his answer filed in this cause wherein he refers specifically to other items, and disputes the correctness of some of them, he does not deny or otherwise question than to say of it, together with others, that he is thus unable to speak with certainty, does not admit it specifically, but calls for proof. It is distinctly alleged in the bill as an item of cash paid, and not *denied* by the answer, and by the law governing the pleadings, required no other proof, but should have been treated as admitted. The commissioner seems to have overlooked the order of reference and the fact that the title bond dated October, 1857, require

the payment of one thousand five hundred dollars against the 1st of November thereafter, when because of the short interval between the date of the bond, which recognized a previous settlement, and the payment of one thousand dollars, he assumed that this sum most probably had been settled.

"Sixth. Because no credit was allowed to the plaintiff for the sum of seven hundred dollars shown by the testimony of See and Cutwright to have been paid or loaned by the plaintiff to W. G. Ward in the month of December, 1857.

"Seventh. Because credit was not given to the plaintiff for the following items of the account filed with the bill, viz.: October 13, 1858, four hundred dollars; *Id.* thirty-two dollars; *Id.* one hundred and ninety dollars; October 28, 1858, thirty-five dollars; November 15, 1858, fifty-four dollars; October 18, 1865, ten dollars, and which were neither denied when presented by A. Hutton to him for settlement in 1869, nor by W. G. Ward in his answer filed in this cause.

"Eighth. Because the amount which the commissioner finds to be due from the plaintiff to the said W. G. Ward at the close of the war, far exceeds the highest estimate by W. G. Ward that such indebtedness could reach, as shown by his repeated statements to the witnesses whose testimony has been given and filed.

"May 16, 1879."

The exception of the defendants is as follows :

"The defendants except to the report of commissioner Jones, because it allows to the plaintiff a credit of one thousand five hundred dollars as of date November 1, 1860, alleged to have been paid to Wash. G. Ward by the plaintiff by Jacob W. Marshall, as the testimony in the cause is wholly insufficient to warrant such credit."

The cause coming on to be heard on the 6th day of December, 1879, the court entered a decree therein, the material part of which is as follows :

"Upon consideration the court is of opinion that the report of said commissioner Jones is not sustained in its material parts by the proofs herein, and the court deeming it proper to make a statement of the accounts between the parties upon the proofs, has made and filed herein a statement of

accounts between the parties marked "Statement of Accounts by the Court" as a part of the record, from which it appears that there was due of purchase-money from William L. Ward, the plaintiff, to Jacob S. Ward, the executor as aforesaid, on the undivided moiety of the tract of land in the bill and proceedings mentioned, on the 1st day of December, 1879, the sum of thirteen hundred and nine dollars and thirty-nine cents (\$1,309.39), and that the contract in respect to the moiety of said land, represented by the title bond of said W. G. Ward, filed with the plaintiff's bill as an exhibit, shall be specifically executed. It is, therefore, adjudged, ordered and decreed that the plaintiff, William L. Ward, do pay to the defendant, Jacob G. Ward, as executor of the last will and testament of W. G. Ward, deceased, the said sum of one thousand three hundred and nine dollars and thirty-nine cents, with interest thereon from the said 1st day of December, 1879, and to him the costs expended by W. G. Ward herein in his lifetime, and to the defendant their costs herein expended."

From this decree the plaintiff appealed to this Court.

C. Boggess for appellant cited 10 W. Va. 31-73, *Id.* 65 and 12 W. Va. 243.

Cressap, for appellees.

SNYDER, JUDGE, announced the opinion of the Court:

The appellant insists that there was no error on the face of the report, and, consequently, so much of it as was not excepted to by either party is presumed to be admitted by them, respectively, to be correct, and that it was, therefore, error for the court to remodel and restate the whole account without reference to the position taken and occupied by the parties in relation to said report.

The party complaining of a commissioner's report must point out the error of which he complains by exception thereto so as to direct the mind of the court to it, and when he does so the parts not excepted to are presumed to be admitted to be correct, not only as regards the principles but also as to the evidence on which such parts are founded.-

McCarty v. Chalfant, 14 W. Va. 531; *Chapman v. P. & S. R. R. Co.*, 18 *Id.* 185.

A commissioner's report, *if erroneous on its face*, may be objected to on the hearing, though not excepted to; but without such exception it cannot be impeached by adult parties on grounds and in relation to matters, which may be affected by extraneous testimony. *McCarty v. Chalfant*, *supra*; *Hyman v. Smith*, 10 W. Va. 298. When adult defendants fail to except to a report of a commissioner they are deemed to acquiesce therein, and they will not be permitted to impeach it either at the hearing of the cause or in the appellate court except for errors apparent upon its face. *Wyatt v. Thompson*, 10 W. Va. 645; *Laidley v. Kline*, 8 *Id.* 218; *Penn v. Spencer*, 17 Gratt. 85; *Ogle v. Adams*, 12 W. Va. 213.

In *Perkins v. Saunders*, Tucker, Judge, in delivering the opinion of the court says: "I have considered it as a settled principle that this court will not enter into an examination of accounts referred to a commissioner, and settled by him, unless an exception to them has been taken in the court of chancery, nor then, unless the exception be so stated as that this court may decide upon the equity, or legality, of the principle only, upon which the article is admitted or rejected, without wasting their time in adjusting the *particulars* of a long and intricate account—a business which is the peculiar province of a commissioner and accountant—and which, if this court were to admit themselves to be bound to engage in, would in a year or two put a total stop to the administration of justice in civil causes in this commonwealth." 2 H. & M. 422; 14 W. Va. 559.

The foregoing principles, for the most part, have reference to appellate courts, but it seems to me the same reasons, which make them proper and necessary for the disposal of the business in those courts, would require their observance in courts of original jurisdiction, the judges of which have as little and, perhaps, less time and fewer facilities for making calculations and unravelling tedious details of complicated accounts. The main object of referring a cause to a commissioner is to relieve the court of such labors. In almost every settlement a large portion of the items are undisputed, and the commissioner having the parties before him can more

readily than the court ascertain and eliminate the undisputed from the controverted matters, and then report upon the whole according to his best judgment, leaving it to any party dissatisfied with any part of the report to except thereto, so as to direct the mind of the court to the precise subject of dispute. In some instances the controversy is confined wholly to questions of law and in others to matters of fact. In either case, if the parties are *sui juris*, and no error appears on the face of the report, it is taken to be *prima facie* correct, and, if no exception is taken thereto, it is confirmed as of course without an examination of the proofs by the court. This is done upon the presumption that the parties by making no objection concede the correctness of the report. And for the same reason, if any part of the report, or separate items thereof, remains unexcepted to such part, or such items, will be regarded by the court and may be treated by the parties as admitted to be correct. The court will not permit any party to impeach a report, correct on its face, as to any matter which may be affected by extraneous evidence unless notice has been given thereof by exception before the hearing. The evident purpose of this rule is to prevent surprise and require the parties to deal frankly with each other and not permit the laying of a trap to obtain an undue advantage at the last moment when all explanation is precluded. It is just as essential to the ends of justice and the due administration of the law that the court should observe this rule as it is for the court to require its observance by the parties. If the court can at the hearing ignore the report and disregard the effect thereof as to the parts not excepted to, the surprise upon the parties may be as great and the result as detrimental as if the court, at the instance of a party, had permitted objections to be taken at the hearing as to matters not excepted to and which might be affected by extraneous evidence. It seems to me, therefore, that the report of a commissioner on the face of which no error appears and which is made in a cause rightly referred, must be treated by the court as well as the parties, at the hearing, as correct, not only so far as it settles principles, but, also, in regard to the sufficiency of the evidence upon which it is founded, except in so far, and as to such parts thereof, as ob-

jection may have been taken by proper exceptions filed by any party; and the court is as much bound by the report so unexcepted to, in whole or in part, as are the parties themselves, and it is error for the court, at the hearing, to remodel and restate the whole account without reference to the report or the action of the parties in excepting or not excepting thereto. If in any case the court is not satisfied with the report in regard to matters not excepted to and which might be affected by evidence *aliunde*, it should recommit it with instructions indicating its opinion, so that the respective parties might have an opportunity of meeting any new phase of the matters thus suggested.

In the case at bar I am of opinion, that the complicated condition of the accounts between the parties and the voluminous and contradictory character of the testimony in relation thereto fully warranted the reference to a commissioner. The parties are all *sui juris*; and they having availed themselves of their legal rights by excepting to such parts of the report, as they deemed to be erroneous, the parts not excepted to were presumed to be admitted by them to be correct. In this condition of the cause the court made a statement of the accounts between the parties which it made the basis of the decree of December 6, 1879. This statement was obviously made without reference to the report or the exceptions filed thereto. It seems to be founded entirely upon the court's estimate of the proofs in the cause, because it introduces items not allowed by the commissioner and not excepted because not allowed, and it excludes others allowed by the commissioner and not excepted to by any party. The parties, in the absence of any exception had a right, as we have seen, to rely upon the sufficiency of the evidence to sustain such parts of the report as were not excepted to; consequently, the court erred in disregarding the report and entering a decree founded on its own statement of the accounts between the parties without reference to said report or the implied admissions therein of the parts not excepted to, especially as the facts might have been explained or changed by extrinsic evidence.

Proceeding now to dispose of the exceptions to the report of Commissioner Jones as the circuit court should have done,

this Court is of opinion that the plaintiff's *first*, *second*, *fourth* and *fifth* exceptions and the *seventh* in part, are well taken and must be sustained. The *first*, because the rule upon which the commissioner computed the interest on the balances therein specified amounts to compounding and is, therefore, illegal and erroneous. The proper rule for computing interest, where partial payments have been made, is to deduct the payment from the aggregate sum of principal and interest, computing the latter to the date of the payment, and the balance forms a new capital; on that interest is to be computed from that time to the next payment, and so on for each payment; but with this caution, that the new capital be not more than the former, so that if the payment be less than the interest due at the time, the excess of interest must not augment the remaining capital, because that would be to give interest upon interest which would be unlawful. When the payment is less than the interest accrued on the principal at the date of the payment, no stop should be made, but the interest should be computed until the payments, whether one or more, are sufficient to absorb the whole of the interest and then the same should be deducted from the sum of principal and interest—*Lightfoot v. Price*, 4 H. & M. 431; *Hurst v. Hite*, 20 W. Va. 183.

The *second* and *fourth* because Washington G. Ward in his answer to the plaintiff's bill expressly admits that the plaintiff paid for him thirty-seven dollars and fifty cents to Caleb Boggess and sixty-five dollars to R. S. Ward.

The *fifth*, because the one thousand dollars referred to in this exception was charged on the account presented to said Washington G. Ward in 1869, when a settlement was attempted between said Ward and the plaintiff, and it was, also, asserted in the plaintiff's bill and charged on the account filed therewith, and its correctness was not questioned except by implication, in the answer of said Washington G. Ward to plaintiff's bill, although he specifically and expressly disputed many other items of said account of smaller amounts and less importance. Nor was its correctness disputed by said Ward at said attempted settlement or objected to so far as can be ascertained from the testimony of A. Hutton and the defendant Jacob G. Ward both of

whom were present on that occasion. The sum is so large that it is not at all probable it would have been allowed to stand without objection on these occasions, while a number of smaller items were objected to and declared erroneous, unless it had been a proper charge. I am very much inclined to believe that this one thousand dollars represents the payment referred to in the deposition of H. Snyder as paid by him for the plaintiff to said Ward. The sum is not precisely the same but the small difference may be readily accounted for by the interest which accrued between the date at which it is charged and the time of the actual payment by Snyder. The title-bond given but a few weeks before required a payment in excess of this sum at the date of this charge. It is not likely that the plaintiff would wholly fail to meet any part of such a large payment upon a contract so recently made. It is more likely the arrangement to meet it had been made at the time the contract was entered into. I think, therefore, this item of one thousand dollars paid November 1, 1857, should be allowed.

The *seventh* exception, except as to the item of ten dollars, alleged to have been paid in October, 1865, should be sustained. The said item of ten dollars was disputed in the answer of Washington G. Ward and is proved to be incorrect by J. G. Ward to whom it is alleged it was paid. Neither of the other items in said exception are expressly denied by said W. G. Ward in his answer to plaintiff's bill, nor does it appear that he objected to any of them when presented to him by Hutton for settlement in 1869, although other items on the account were then disputed.

The plaintiff's *third*, *sixth* and *eighth* exceptions must be overruled. The *third*, because the two hundred and fifty dollars therein referred to was denied and declared erroneous by W. G. Ward when presented to him by Hutton, and there is no evidence to sustain said item or controvert said denial.

The *sixth* is not well taken for the reasons hereinafter stated in considering the defendant's exception. And the *eighth* is simply an assertion in regard to the evidence and is too general and indefinite to constitute a sufficient exception to a report. *Sandy v. Randall*, 20 W. Va. 244.

The defendant's exception to said report must be sustained, because the proof, if it has any relation whatever to the one thousand five hundred dollars excepted to, is wholly insufficient to establish it as a proper charge. The circumstances tend strongly to cast suspicion upon this item and the seven hundred dollars mentioned in the plaintiff's sixth exception, if they do not fully condemn them. It is shown conclusively that neither of these large items was charged on the account of the plaintiff, which was furnished to A. Hutton in 1869 to settle by, nor was either on the account as originally filed with the plaintiff's bill. They were not on said account when Washington G. Ward answered the bill; and they were never claimed or asserted until after the death of said Ward, who was, perhaps, believed to be the only person that could show their injustice. After the death of the original defendant they seem to have been surreptitiously added to the account filed with the bill at the foot of the other charges. In the answer subsequently filed by the executor, Jacob G. Ward, he positively denies the correctness of both these items. The testimony by which they are attempted to be supported is altogether too vague and conjectural to establish such large items which, if correct, it may well be presumed could be proved with more certainty. J. W. Marshall, by whom it is alleged the one thousand five hundred dollars was paid, proves nothing in support of any such payment. His testimony may relate to a different transaction and with equal propriety might be invoked to prove any other charge on the plaintiff's account. Much of the other testimony is very improbable and much discredited if not successfully impeached by the defendants' proof and the circumstances in the cause. Upon a careful consideration of all the evidence I am clearly of opinion that the said items of seven hundred dollars and one thousand five hundred dollars should each be disallowed.

I am, therefore, of opinion, for the errors aforesaid, that the decree of December 6, 1879, should be reversed with costs to the appellant against the appellee, Jacob G. Ward, executor of Washington G. Ward, deceased, to be levied of the goods of his testator in his hands to be administered, and that the cause be remanded to the said circuit court of Randolph county with directions to said court to recommit the

report of Commissioner Jones to him or some other commissioner with instructions to such commissioner to reform said report and account and ascertain the balance between the plaintiff and the estate of said Washington G. Ward, deceased, according the principles of this opinion and report to said court; and that the cause be further proceeded in in said circuit court in accordance with the rules and practice in courts of equity.

JUDGES JOHNSON AND GREEN CONCURRED.

DECREE REVERSED. CAUSE REMANDED.

WHEELING.

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MITCHELL *et al.* v. CARDER.

Submitted January 11, 1883—Decided March 17. 1883.

(WOODS, JUDGE, Absent.)

1. A party, who is in possession of lands under claim of title, makes it his as against the world except as to the true owner, and it remains his as against all persons entering without his consent, unless he abandons the land; and he may recover the possession of the land by a writ of unlawful entry and detainer, even of the true owner, who has entered upon the same without the occupant's consent and without his abandonment of such land. (p. 283.)
2. If such person in possession of such land leaves it with the intention of returning and taking possession of it at a future time, he does not abandon such land, even though no one be upon the land for a considerable length of time. An abandonment takes place, only when one in possession leaves with an intention of not again resuming possession; for abandonment is a question of intention; and mere lapse of time does not constitute abandonment, though it is proper to be considered in ascertaining the intention of a party, who has left land, which he has been occupying. (p. 285.)
3. So too the promptness or delay of a former occupant in instituting suit or demanding possession of one, who has entered on the land, is proper evidence to be considered in ascertaining such intention of the first occupant; and indeed a wide range should be allowed, for it is generally only from all the surrounding facts

and circumstances, that the intention of an occupant of land can be ascertained, when he has left its possession. (p. 288.)

4. But if such an occupant of land having no valid title has in point of fact so abandoned the possession of land with no intent of resuming it, then any one may take possession and hold against him, even though he promptly institute proceedings to recover such possession; but the burden of proving clearly such abandonment rests on the one who asserts it. (p. 290.)

Writ of error to a judgment of the circuit court of the county of Jackson, rendered on the 12th day of March, 1886, in an action of unlawful detainer in said court then pending wherein A. B. Mitchell and J. W. Mitchell were plaintiffs and Z. P. Carder was defendant, allowed upon the petition of said Carder.

Hon. Robert F. Fleming, judge of the sixth judicial circuit, rendered the judgment complained of.

GREEN, JUDGE, furnishes the following statement of the case:

At the September term, 1864, of the circuit court of Jackson county, one James M. Reynolds obtained a judgment against the defendant, Z. P. Carder, for two hundred and twenty-five dollars and interest and cost, which was duly docketed and immediately thereafter a subpoena in chancery was issued in a suit brought in said circuit court to enforce this judgment out of the defendant's lands.

On October 1, 1865, this subpoena was returned by the sheriff; the return being, that the defendant was not found in his bailiwick. On January 19, 1866, the plaintiff in the chancery suit filed his affidavit, that the defendant, Z. P. Carder was a non-resident of the State of West Virginia, and at the March rules 1866, the plaintiff, Reynolds, filed his bill asking to charge the two tracts of land, the subject of controversy in this cause, with the payment of this judgment improperly described as having been rendered in 1866, but otherwise described as corresponding with said judgment, as the property of the defendant, Z. P. Carder.

On September 19, 1866, a decree was rendered in this cause, which recited, that order of publication had been duly executed against the defendant, Z. P. Carder, and that the

bill was taken for confessed against him, and thereupon the court, Hon. George Loomis presiding, rendered a personal decree for two hundred and twenty-five dollars, the amount of said judgment and for eighteen dollars and one cent the costs of the suit at law and also for the costs of this chancery suit; and further decreed, that unless this was paid in thirty days W. W. Flesher, as commissioner, should sell said lands of the defendant, Z. P. Carder, or so much thereof as was necessary for cash in hand, after advertising the time and place of sale for twenty days, at the front door of the court house of Jackson county. No bond was required to be given by the special commissioner.

On February 4, 1867, W. W. Flesher, the special commissioner, sold said lands of the defendant, Z. P. Carder, for three hundred and fifteen dollars and eighty-seven cents which was just the amount decreed against Z. P. Carder. This report of the sale was confirmed by the court and a deed ordered to be made to the purchaser, Wm. T. Greer, and the decree further directed the commissioner to convey said land to said Wm. T. Greer, *with covenant of general warranty on behalf of Z. P. Carder*. On February 18, 1868, such a deed with such warranty was executed pursuant to said decree. On the 20th day of September, 1874, Z. P. Carder, filed a petition for a rehearing of said cause alleging, that there were palpable errors in the decrees and proceedings above mentioned, and J. W. English was selected as the special judge to try the cause, and Z. P. Carder filed his answer in said cause. It denies, that any such judgment as was stated in the bill was ever rendered against them, but admits that a similar judgment was rendered in 1864, though there was no personal service on him in said common law suit; but in it he was proceeded against only as a non-resident by order of publication. He did not appear in this common law suit nor did any attachment issue against him, and the judgment was therefore a mere nullity and was afterwards, at the March term 1875 of said circuit court, set aside, reversed and annulled; and he claims that this pretended judgment was no lien on his lands.

On the 4th of September, 1879, a final decree was rendered in said cause, and the decree rendered in this cause directing

a sale of the land of Z. P. Carder, as well as the decree confirming the sale and directing a deed to be made to W. T. Greer, the purchaser, were set aside, annulled and held for naught, and the plaintiff's bill was dismissed and the defendant was decreed his cost against the plaintiff. Z. P. Carder owned said lands by a conveyance of it to him in 1854, and he was in possession of it for several years prior to this sale by the special commissioner in 1867. After this deed to Greer had been made he conveyed this land to one Kent, who lived upon it for about ten years, and in the spring of 1880 he re-conveyed this land to Greer, who took possession of it and on the 10th day of April, 1880, he leased this land to the plaintiffs A. B. and J. W. Mitchell for one year from March 1, 1880. The rent was ten dollars and the lessees agreed to take possession of and hold the same for this term and to surrender the possession at the end of said term. Before, however, the conveyance was made by Kent to Greer, the defendant, Z. P. Carder, had, in 1879, instituted an action of ejectment against Kent for this land, which was still pending. When this lease was made in April, 1880, one of the plaintiffs, J. W. Mitchell, took possession of this land and sowed on it some oats and flax, and his brother A. B. Mitchell, the other plaintiff, also occupied the premises. He was unmarried, but had a bed in the house situated on this land and some housekeeping articles and ate there, and when he left the house temporarily he fastened it up leaving these articles there. In April or May of 1880, this house which had been so occupied by A. B. Mitchell was burned down. How it happened to be burned does not appear, but when it was burned it was not occupied, as A. B. Mitchell who had occupied it had moved to his home not on this land and had taken with him his bed, which he had in this house. After the burning of the house, the plaintiffs had for a time some cattle upon the place and went to it frequently; but they were all taken out by about October first. A. B. Mitchell took out his cattle first, but the mare and colt of J. W. Mitchell, remained on the place till about October 1, 1880, and there were some hogs of the plaintiffs still remaining on the place when the defendant, Z. P. Carder, entered on and took possession of the place on November 2, 1880.

But from a time as far back as April 1, 1880, the outside fencing of the said land was down in two or three places and the inside fencing was open, so that stock could pass from one field to another and the stock of the country were in the fields running at large, and the land had all the appearance from and after August 1, 1880, of abandoned property. It was used as commons and was not apparently under the control or in the possession of any person. A. B. Mitchell had gone back to his home elsewhere than on this land, but how far from it the record does not show though he does not appear after August, 1880, to have exercised any control over this land, and whatever control was exercised over it after that time was exercised over it by J. W. Mitchell. In October, 1880, he went to live at a place some fifteen miles from this land, and before that during the summer and fall, he was travelling about with a machine for shaving staves, in which business he was engaged, having given up farming. He says he was at the kitchen or smoke-house on this land on Sunday morning just before the defendant, Z. P. Carder, took possession of it. This kitchen or smoke-house was near the dwelling-house, which had been burned and was still standing. He says, that he nailed up the door of this smoke-house and left it nailed up, and this is the only act of control over this land, which he appears to have exercised for some months; he does not state why he nailed it up and there appears to have been no apparent reason for his so doing, as this smoke-house had nothing in it.

When the defendant, Z. P. Carder, took possession of this land on November 2, 1880, there was no one upon the land and no personal property of any kind upon it. The door of this smoke house was then open and the fencing was down as stated before, and there were on the place then two cattle, one belonging to some person unknown and the other to the defendant, Z. P. Carder. There were then probably some hogs roaming over the lands, but they were not seen by the defendant, Z. P. Carder, and among these hogs were some of the hogs of the plaintiff probably. The next day after Z. P. Carder took possession of this land, A. B. Mitchell and J. W. Mitchell sued out a writ of unlawful detainer against him for the possession of said land containing some

two hundred acres; and on March 12, 1881, the defendant plead, that he was not guilty of unlawfully withholding from the plaintiffs this land, and neither party requiring a jury, the court was by consent of parties substituted in lieu of a jury to hear the evidence and try the case.

The facts above stated were proven and the court thereupon found for the plaintiffs and adjudged, that they recover of the defendant possession of this land and their costs, and a writ of possession was awarded them. The defendant moved for a new trial, which the court refused and he took a bill of exceptions, in which the facts proven as above stated are certified; and on the petition of the defendant, a writ of error has been awarded him by this Court to this judgment.

Henry C. Flesher for plaintiff in error.

The judgment complained of should be reversed, because it was contrary to law and evidence.

The plaintiff in error entered upon the land *bona fide*, under his legal title thereto. He used no force to make such entry, and he has a lawful right to take possession of his land, if he could do so without force. *Moore v. Douglass*, 14 W. Va. 708; Minor's Inst. Vol. 4, pl. 1, p. 1; § 111.

Cattle and goods cannot be substituted as agents to hold possession. No authority need be cited to sustain their proposition.

The possession of the defendants in error must be an actual possession of the land. *Olingi v. Shepherd*, 12 Gratt. 462.

He must show that he was turned out forcibly, or by one having no right. *Id.*

No appearance for defendant in error.

GREEN, JUDGE, announced the opinion of the Court:

The record in this case shows, that the plaintiffs, the Messrs. Mitchell, ought not to have recovered the possession of the land in controversy unless it can be inferred from the evidence, that they were in possession of said land on November 2, 1880, when the defendant below, Carder, entered upon and took possession of the land. If they were then in such possession, they had a right in this proceeding

to recover the possession of this land, even though they had no valid title to it and the defendant, Carder's title was perfect. They claimed the land under one Greer, who being in possession of and claiming title to it, made a *bona fide* lease of it to them, and their lease had not yet expired. Greer it is true, claimed title to this land under a deed made by a special commissioner authorized by the decree of the circuit court of Jackson, to convey this land to him. But this decree had by a subsequent decree of the court been set aside, reversed and annulled, and the deed made under it thus became null and void. Greer had taken possession of this land before this decree was thus annulled, and so far as this record shows, he was holding possession of it under a *bona fide* claim of title when he leased it to the Messrs. Mitchell and put them in possession thereof. He had therefore so far as is shown by the record, no valid title to the lands except such as arose from his having possession of it under a *bona fide* claim of title.

Of course the title of the Messrs. Mitchell to this land was also invalid, except that they had such title as Greer, their landlord had, that is, such title as adversary possession alone would confer. Their title then, resting in adversary possession alone, of course if this possession was abandoned by them, any other person without doing them any wrong could enter on and take possession of this land. Such entry as against them would be lawful, and they could not in this sort of action or proceeding recover possession. And if the court could not in this proceeding recover of a stranger, who took possession of this land when the possession was vacant, they would not of course recover it if in this proceeding of Carder, who claimed to have title to the land. But, if they could recover it of a stranger because they had not abandoned the possession of this land, they could also in this proceeding recover it of Carder, though his title was ever so good.

In this proceeding he stands in no better attitude than any mere stranger. It is true, that Carder had apparently great ground of complaint on account of the gross injustice and wrong, which the circuit court of Jackson county did him, when it ordered a deed for this land conveying his title to

be made to Greer, with general warranty of the same on the part of and in the name of Carder. This was but little if anything else than a judicial robbery of him. A judgment had been rendered against him by that court, in a common law suit brought by one Reynolds. Carder was never served with any summons in this suit, but was proceeded against, as he alleges and I suppose truly, though the record before us is in this respect quite imperfect, only by order of publication unaccompanied by any attachment; and he never appeared in this common law suit, yet the court without any jurisdiction in the case rendered a personal judgment against him, and even this judgment had been set aside; yet on this judgment Reynolds brought a suit in chancery in said court to enforce the supposed lien of this pretended judgment. Carder was a non-resident of the State and was not served with any process in this chancery suit, and though he did not appear, and there was no attachment in the case, the circuit court rendered a personal decree against him and ordered the sale of his land by a special commissioner, who was not required to give any bond, and who, strange to say, was authorized to sell this land for *cash* on twenty day's notice given only by posting the notice of sale at the court house door. This sale was made and Greer became the purchaser, bidding for it only the amount of the pretended judgment against Carder and the costs. This sale was confirmed by the said court, and a deed was made conveying this land with general warranty of title, as against Carder, by a special commissioner under the order of the said court; under this deed Greer took possession of this land.

A portion of these judicial outrages were redressed, when subsequently the special judge presiding in said court revoked, set aside and annulled all these unjust decrees and dismissed the bill. But the court did not restore the possession of this land to Carder, and it is not for us in this case to enquire into the justice of the former decrees in this cause or whether the defendant, Carder, ought not by the final decree rendered in this cause to have been restored to the possession of his land. One thing is certain, he had no right to redress himself any wrongs he may have sustained, either by forcibly taking possession of his land or by entering on it peaceably

while it was in the possession of Greer or of his lessees, the Messrs. Mitchell. If these lessees however abandoned this land so that it was vacant as to possession, then Carder or indeed any one else might have entered upon it without doing any wrong to the Messrs. Mitchell.

The only question therefore to be decided in this case is, had the Messrs. Mitchell on November 2, 1880, when Carder took possession of this land, abandoned it. If they had not, the judgment of the circuit court must be affirmed and if they had, it must be reversed. Of course there can be no abandonment of land while a party in person or by any agent is in possession of any part of it. But the reverse of this proposition is not necessarily true, though a party and every agent of his be absent from the land; it may be for months or even years, yet it will not necessarily follow, that this land has been abandoned so as to justify a stranger in taking possession of it in the absence of one, who had held it in possession claiming title to it. If such a person, who has been in the possession of the land leaves it, with the intention of returning, he does not abandon it. Lapse of time during such absence does not constitute abandonment, though it may be given in evidence for the purpose of ascertaining the intention of the party; but abandonment can take place only when one in possession leaves with the intention of not again resuming possession. It is therefore a question of intention.

When title by prior possession is once shown there is no presumption of its loss; but an abandonment must be made to appear affirmatively by a party relying on it to defeat a recovery of the land. See *Moon v. Rollins*, 36 Cal. 333. A party thus abandons the possession of land, when he leaves it free to the occupation of the next owner, whoever he may be, without any intention to repossess it and regardless and indifferent as to what may become of it in the future. See *Richardson v. McNulty*, 24 Cal. 345; *St. John v. Kidd*, 26 Cal. 263; *Warring v. Crow*, 11 Cal. 369; *Keane v. Cannovan*, 21 Cal. 291; *Bell v. Bedrock Tunnel and Mining Co.*, 36 Cal. 214.

These California decisions are in their reasoning sustained by decisions elsewhere. It cannot be, that if a person in possession of land claiming title to it leave it for a tempo-

rary purpose with an intention of returning, another cannot treat his possession of the land as abandoned and lawfully enter upon the land in opposition to him and take possession thereof in the temporary absence of the previous possessor. Such conduct is justified neither by religion, morality nor the law. It as naturally and almost as inevitably leads to breaches of the peace, as would the forcible entering on the possession of another. See *McLaughlin v. Mabury*, 4 Yeates 537; *Lessee of Clemmins v. Gottshall et al*, 4 Yeates 334. See also, *Miller v. Cresson*, 5 Watts & S. 284; *Heath v. Biddle*, 9 Pa. St. 273; *Davis v. Perley*, 30 Cal. 630; *McGoon v. Ankeny*, 11 Ill. 558.

This last case was an application of the principle of abandonment to personal property, and some of the other cases referred to were cases of the possession of public lands, more or less influenced by statutory law. But we conclude that these and other cases which might be referred to fully sustain the general principles we have laid down in determining what amounts at common law to an abandonment of land, which has been in the possession of a party claiming title to it, but having none except that derived from possession. When such abandonment takes place, any one else may take possession of the land lawfully as against the party, who has thus abandoned the possession; and he can not be ousted therefrom by an action of unlawful entry.

We will now apply this law to the facts in this case. The Messrs. Mitchell were certainly in the possession and care of this land in the month of April or May, 1880. They claimed it under a lease from Green, which expired March 1, 1881. The land contained about two hundred acres, was enclosed and divided into fields, and had on it a dwelling-house, presumably a very indifferent one, and near this dwelling-house was a smoke-house. The land in its then condition was of but little value, the rent which the Messrs. Mitchell were to pay for it being only ten dollars for a year, and they only rented it for a single year. They sowed on it some oats presumably a small quantity and some flax, and while engaged in preparing for their crops one of the parties, an unmarried man, had a bed in this house and slept and ate there, but he took his bed away and moved to his home probably during

the month of April or May, 1880, and shortly thereafter the house on this place was burned down. How this happened does not appear, but so far as the evidence shows this burning was without the knowledge or agency of Carder, who had some years before brought an action of ejectment for this land, which was still pending. For a short time after this house burned down, the Messrs. Mitchell continued to control this land and to occupy it, having on it cattle and hogs, and superintending the land and keeping up the fencing. But the plaintiff, who was married and appears to have exercised the principal control of this place, concluded early in the summer of 1880 to give up farming and engage in shaving staves with a machine, which he had bought. This required him to travel over the country from place to place, and this land, as appears by the evidence, was abandoned entirely by the Messrs. Mitchell. As early as August, 1880, its condition was shown to have been a commons for the cattle and hogs of the neighborhood; the outside fence being down in several places, and the inside fencing being in such a condition that cattle could pass from one field to another. One person who was hauling through this land during the month of October, 1880, did not see either of the Messrs. Mitchell on it during that month. He asked leave to haul through it that fall of the defendant, Carder, as the land appeared to be in the possession of no one and he then regarded it as commons and abandoned. It is true, that among the other hogs running over this land were some belonging to the plaintiffs, and one of the plaintiffs, J. W. Mitchell, had a mare and a colt pasturing on this land in September or October, 1880; but it was then the season for pasturing cattle in that neighborhood, and their hogs appears to have been there only in common with the hogs of others in the neighborhood, the place being open for any cattle or hogs to pasture on.

The Messrs. Mitchell, do not appear after August, 1880, to have paid any attention to this land or to have exercised any control over it more than others. The only time that it is proven, that either of them was on this land after August, 1880, except to take from it this horse and colt, was just before the defendant, Carder, took possession of it, when J. W.

Mitchell states, that he passed through the land and nailed up the smoke-house door. Why he did so he does not state nor is his reason for so doing apparent as there was nothing whatever in it to be preserved. It was again open perhaps the next day and when the defendant, Carder, took possession of this land he found the smoke-house door open.

This isolated act of nailing up this door, apparently without a purpose, seems to me not to justify the conclusion, that the Messrs. Mitchell intended to resume possession and control of this land, especially when it is remembered, that the Mr. Mitchell who did this had been living for a month before that and was still living fifteen miles distant and was engaged in other business, having abandoned farming. Under these circumstances it seems to me impossible to suppose, that they had any idea of resuming possession or control over this land. Their right to the possession of it would expire on March 1, 1881, and they could hold possession of it from November 1, 1880, for only four months, the three winter months and the month of November. Surely land, whose use was worth only ten dollars a year, was worth so little, after the house was burned, during these four cold months, as to render it highly improbable under the circumstances, that the Messrs. Mitchell entertained then any intention of resuming possession and control, which they had abandoned, when the land would have been worth far more to them.

Despite all these circumstances, which would seem clearly to indicate, that the Messrs. Mitchell had abandoned this land and had for months preceding November 2, 1880, no intention of resuming possession or control over this land during the residue of their term, yet, there is one circumstance which is apparently inconsistent with this conclusion and would seem to indicate a fixed purpose on the part of the Messrs. Mitchell to resume such possession and control, and that is, that as soon as the defendant, Carder, took possession of this land, they immediately brought this action of unlawful entry against him and asserted their right to the possession of this land. Unless this inconsistency can be satisfactorily explained in connection with their abandonment of this land permanently, it alone would suffice to show, that they did always have the intention of resuming possession of this

land; and had not therefore abandoned it in the legal sense of abandonment.

A suit thus promptly brought would of itself ordinarily fully establish the fact, that there had not been an intention to abandon the land. In *Keane v. Cannoran*, 21 Cal. 303, the court says: "There are cases undoubtedly, in which an abandonment may be inferred from the lapse of time and the delay of the first occupant in asserting his claim to the possession against the parties subsequently entering upon the premises." Now the reverse of this is also obviously true, that "the institution of a suit by the first occupant asserting his claim to the possession against the party subsequently entering upon the premises immediately on hisso entering, would ordinarily rebut any presumption of an intention on the part of the first occupant to abandon the land unless it can be shown, that his instituting the suit arose not from any desire to again occupy the land, but for some reason entirely consistent with a previous purpose of abandoning the land with no intent of resuming possession at any future time as indicated by the evidence in the case."

In this case the motive for instituting this proceeding by the Messrs. Mitchell, as is satisfactorily shown by the record, was not a desire to repossess themselves of this land for the few winter months which remained of their lease, but obviously arose from an anxiety to avoid litigation with this landlord Greer, who had inserted in their lease a provision to the effect that his "lessee would take possession and hold the same till March 1, 1881, and then would give possession of said land to said Greer." This provision of the lease they violated when they abandoned the possession of this land, probably as early as August, 1880, without any intent of ever again resuming possession of it. And had it been taken possession of by any person other than Carder, there is no probability that they would have complained. But they well knew when Carder took possession of it, that he would not surrender the possession on March 1, 1881, to Greer, and that he would thereby have a cause of action against them for violating these covenants in the lease. To avoid this difficulty doubtless they brought this suit, and not from any desire to repossess themselves of this land, which they had abandoned.

No doubt when they abandoned this land without any intention of resuming possession of it, they did not contemplate the probability of Carder's taking possession of it and thus involving them in a litigation with Greer, the landlord. But, if as we have seen, on November 2, 1880, when Carder took possession of this land, the possession of it was then vacant and it had been before that abandoned by the Messrs. Mitchell with no intent of ever again resuming possession of it, they can have no ground of complaint against Carder for an unlawful entry on this land, for he had under these circumstances, as we have seen, a lawful right to enter upon and occupy the same. The change of mind subsequently on the part of the Messrs. Mitchell because of the difficulty, in which they might become involved with their landlord, cannot render unlawful as against them the entry and possession of Carder, which had taken place when they had no intention of repossessing said land.

The court below assigns no reason for its judgment, but from the position of counsel I presume that he regarded the land as in the actual occupancy of the Messrs. Mitchell, on November 2d, 1880, when Carder entered upon it, because at that time some hogs of the Messrs. Mitchell were pasturing on it. But so far as this reason obtains it might as well be regarded in the possession of Carder, who had a cow pasturing upon it, or in the possession of any of the neighbors whose cattle and hogs were pasturing on it also; it being really a common, on which all cattle and hogs in the neighborhood, not enclosed, pastured.

For these reasons the judgment of the circuit court, rendered at the March term, 1881, must be set aside, reversed and annulled; and the plaintiff in error must recover of the defendants in error his costs in this Court expended. And this Court proceeding to render such judgment, as the court below should have rendered, doth find the issue for the defendant below, Z. P. Carder, and that of said proceedings against him he go without date and recover of the plaintiffs below, A. Mitchell and J. W. Mitchell, his costs, in the circuit court of Jackson county expended, including an attorney's fee of \$

JUDGES JOHNSON AND SNYDER CONCURRED.

JUDGMENT REVERSED.

WHEELING.

MILLER *et al.* v. ROSE *et al.*

Submitted June 22, 1882—Decided March 24, 1883.

(*WOODS, JUDGE, Absent.)

1. The court must be affirmatively satisfied that there is error in the judgment of the court below to the prejudice of the plaintiff in error before it can reverse such judgment. (p. 292.)
2. In a proceeding, under section 29 of chapter 194 of the Acts of 1872-3, to remove gates erected across a public road, this Court will not reverse an order of the county court directing the removal of such gates upon the application of a person who appeared in the county court and objected to the proceeding unless the record affirmatively shows that such person is the owner or tenant of the lands on which said gates are erected, or that he is otherwise prejudiced by the removal of such gates. (p. 293.)

Writ of error and *supersedens* to a judgment of the circuit court of the county of Jackson, rendered on the 9th day of September, 1879, in an action in said court then pending, wherein Lewis M. Miller and Reuben Douglass were plaintiffs, and Thomas Rose and others were defendants, allowed upon the petition of said plaintiffs.

Hon. Joseph Smith, judge of the seventh judicial circuit, rendered the judgment complained of.

The facts of the case are sufficiently stated in the opinion of the Court.

J. H. Riley, H. C. Flesher and Warren Miller for plaintiffs in error.

George J. Walker and V. S. Armstrong for defendants in error cited 1 Call. 443; 4 Munf. 398, and 3 Rand. 221.

SNYDER, JUDGE, announced the opinion of the Court:

Thomas Rose and fifty-five others, on the 18th day of April, 1879, presented to the county court of Jackson county their

*Case submitted before Judge W. took his seat on the bench.

21	291
35	647

21	291
38	528

21	291
52	380

21	291
55	131

21	291
61	82

21	291
64	366

petition praying for the removal of "certain gates upon the public road leading from the Ripley and West Columbia pike (near the residence of Lewis Miller) in said county to the Ohio river." They also presented with said petition a notice for the removal of all gates on said road and affidavits showing the posting of said notice and moved the court to docket said petition, to which motion the plaintiffs in error, L. M. Miller and Reuben Douglass, objected because the said notice had not been posted for the time and in the manner prescribed by the statute. The court upon an inspection of said notice and affidavits—no other evidence being offered—overruled said objection and docketed said petition and the said Miller and Douglass excepted. On the following day the court made an order directing the surveyor of the road precinct through which said road passes, after the expiration of thirty days, to remove all gates from said road, and giving costs against said Miller and Douglass. To this order the said Miller and Douglass also excepted, and, afterwards, obtained a writ of error to the circuit court of said county which court, on the 9th day of September, 1879, affirmed the said order of the county court, and from said judgment affirming said order of the county court they have, by writ of error, brought the case to this Court.

The plaintiffs in error have assigned several errors in this Court, but in our view of the case it is unnecessary to consider any of them for the reason that this writ of error must be disposed of on a preliminary question.

This proceeding was taken under the provisions of section 29 of chapter 194 of the Acts of 1872-3, which section is as follows: "29. The county court of a county may upon petition, permit gates to be erected across any county road therein, or cause any gate erected across a county road to be removed; but notice of every petition for that purpose must first be posted at the front door of the court house and at three public places in the vicinity of the gate proposed to be erected or removed, at least three weeks before the meeting at which such order is made."

It is well settled that to entitle a party to obtain and prosecute a writ of error or appeal in this Court, he must not only be a party to the controversy, but the record must affirma-

tively show that he has been prejudiced by the order, judgment or decree from which the writ of error or appeal is taken—*Supervisors v. Gorrell*, 20 Gratt. 484; *Shrewsbury v. Miller*, 10 W. Va. 115; *Richardson v. Donehoo*, 16 W. Va. 685.

Unless the court is affirmatively satisfied that there is error to the prejudice of the plaintiff in error, in the judgment of the court below, it will not reverse such judgment. In this proceeding the record does not show that the plaintiffs in error are in any manner affected by the order of the county court of which they complain. It does not appear that they, or either of them, are the owners of land over which said road passes and on which the gates removed are located, or that they are benefited by said gates or injured by the removal thereof. If the proceeding under the statute above quoted had been for the erection of gates across a public road, this Court would presume that they were affected prejudicially by an order of the court establishing the gates, because every person is entitled to the free and unobstructed use of the public roads and therefore injuriously affected by the erection of gates or other obstructions across the same. The record in this case showing nothing to the contrary we must presume that these plaintiffs in error are but a part of the general public having no interests in the matters in question other than that of every other person in the community, and consequently the presumption is that they are not only not prejudiced but that they are benefited by the removal of the said gates. If, however, they had shown affirmatively to the court or if the fact had appeared upon the record in any satisfactory manner, that the plaintiffs in error were the owners or tenants of the lands through which said road passes and that the gates had been erected for their use, convenience and benefit, then I am of opinion that they might, under a proper construction of the statute, have properly made themselves parties to the proceeding by appearance in the county court and thus entitled themselves to prosecute a writ of error in this Court in case of an erroneous order of the county court removing their gates. But inasmuch as they have failed to show that they are such owners or tenants, and the record nowhere disclosing that they have any

private interest which can be affected by the removal of said gates, they have failed to show affirmatively to this Court that the judgment complained is to their prejudice and, consequently, the judgment of the circuit court affirming the order of the county court must be affirmed with costs and thirty dollars damages to the defendants in error.

JUDGES JOHNSON AND GREEN CONCURRED.

JUDGMENT AFFIRMED.

WHEELING.

HOULT v. DONAHUE.

Submitted June 19, 1882—Decided March 24, 1883.

(*WOODS, JUDGE, Absent.)

1. A., having the equitable title to a tract of land, executed a trust deed thereon to secure a debt to B. which was duly recorded; subsequently A. sold said land for a valuable consideration to C., and by direction of A., the person holding the legal title, conveyed said land by deed directly to C., who had no actual notice or knowledge of said trust deed to secure B. until after he had acquired the legal title to the land and had his deed recorded.
HELD:

That, under the first provision of section 10 of chapter 74 of the Code, the record of said trust deed did not operate as constructive notice to C., and he was not affected by such record, he not having derived his title from A., who executed said trust deed, within the meaning of said statute. (p. 299.)

2. A purchaser of land for a valuable consideration, without notice of a prior equitable right, obtaining the legal title at the time of his purchase, or before he has notice of such prior equity, is, in a court of equity as well as at law, entitled to priority according to the maxim, "where equities are equal the law shall prevail." (p. 300.)

Appeal from and *supersedeas* to a decree of the circuit court

*Cause submitted before Judge W. took his seat on the bench.

of the county of Doddridge rendered on the 27th day of July, 1881, in a cause in said court then pending, wherein A. E. Hoult and others were plaintiffs, and Michael Donahue and others were defendants, allowed upon the petition of said plaintiffs.

Hon. Thomas J. Stealey, judge of the fourth judicial circuit, rendered the decree appealed from.

SNYDER, JUDGE, furnishes the following statement of the case :

Under a decree of the circuit court of Lewis county, Edwin Maxwell as commissioner of said court, on 26th day of February, 1855, sold to Daniel Sherwood a tract of about one hundred acres of land, lying on the waters of Middle Island creek in Doddridge county, at the price of three hundred and seventy-four dollars, on a credit of six, twelve and eighteen months; that on September 1, 1855, said sale was confirmed by a decree of said court and said Commissioner Maxwell directed to collect the purchase-money and make a deed to the purchaser when the same should be paid; that on the day of said sale A. E. and Wm. E. Hoult, by verbal contract, purchased from said Sherwood twenty-two and one half acres, part of said one hundred acres of land, and soon after were placed in possession thereof and have held and occupied the same ever since under said purchase; that by written contract, dated May 3, 1873, the said Sherwood acknowledged the payment of the purchase-money by said Hoult for said twenty-two and one half acres and bound himself to make to them a deed therefor, with general warranty, as soon as he could procure a deed for said one hundred acres from said Commissioner Maxwell; that on the 24th day of April, 1862, the said Daniel Sherwood, by written contract of that date, admitted that he had sold to Samuel T. Sherwood fifteen and one half acres, also part of said one hundred acres, that the purchase-money therefor had all been paid except fifty dollars, which was to be paid in six and twelve months, and he bound himself to make to said Samuel T. for said fifteen and one half acres a deed, with general warranty, as soon as said fifty

dollars should be paid; that said Samuel T. was at the date of said contract placed in possession of said fifteen and one half acres and he has held and occupied the same ever since; that subsequently, by written contract, dated April 5, 1876, the said Daniel sold to said Samuel T. twenty-two acres and another part of said one hundred acres, at the price of three hundred dollars, of which two hundred dollars was paid at the time, and the said Samuel T. was then placed in possession and has ever since held and occupied said twenty-two acres; that in the winter or spring of 1876, the said Samuel T., discovering that the said Daniel had failed to pay a large part of the original purchase-money for said one hundred acres and that no deed had been or could be made to him therefor until said original purchase-money should be fully paid, paid to Commissioner Maxwell for said Daniel two hundred and one dollars and seventy-five cents for which the said Daniel agreed to have said commissioner convey to him, the said said Samuel T., about twenty-seven acres of said one hundred acres in addition to that theretofore purchased by him, making the whole quantity purchased by said Samuel T. sixty-four acres; that, by direction of said Daniel and a memorandum filed in the cause aforesaid a decree was entered therein, June 19, 1876, directing the said Commissioner Maxwell that, instead of conveying said one hundred acres to said Daniel, he should execute and deliver deeds therefor as follows: To said Samuel T. Sherwood for sixty-four acres, to A. E. Hoult for twenty-two and one half acres and to Elizabeth Davis for twelve and one half acres; that by virtue of said decree said commissioner did, by separate deeds, convey to said Samuel T. sixty-four acres and to said A. E. Hoult twenty-two and one half acres of said one hundred acres of land; that each of said deeds is dated in February, 1877, and was duly recorded in Doddridge county March, 1877.

In the meantime said Daniel had, on the 29th of March, 1869, executed a trust-deed on said one hundred acres of land, and also on another tract of one hundred acres on which he resided in said Doddridge county, to Michael Donahue trustee to secure a debt of five hundred dollars due from him to C. J. Stuart which deed was duly recorded

in said county January 10, 1870; and, on January 8, 1870, he executed another trust-deed upon the said tract upon which he resided to F. D. Hickman trustee, to secure a debt of one thousand and fifty-seven dollars and twenty-four cents, to Floyd Neely which was duly recorded in said county November 12, 1870; that prior to February 27, 1876, the said Hickman as trustee sold said last mentioned tract under the trust-deed to him and B. H. Maulsby purchased the same, and the said trustee by deed, dated February 29, 1876, conveyed the said one hundred acres, last referred to, to B. H. Maulsby, which deed was recorded in said county July 6, 1876; that afterwards, being required by the said C. J. Stuart, the said Donahue as trustee gave notice that he would, on April 19, 1880, under the aforesaid trust-deed executed to him, sell both the said tracts of one hundred acres each, therein conveyed, to satisfy the debt of said Stuart; that thereupon the said A. E. and Wm. E. Hoult and Samuel T. Sherwood filed this bill against the said Donahue trustee, C. J. Stuart, Daniel Sherwood and B. H. Maulsby, and obtained from the judge of the circuit court of Doddridge county on April 19, 1880, an injunction restraining the said Donahue trustee and all others from selling their said sixty-four and twenty-two and one half acres of land conveyed to them as aforesaid until the further order of said court. The defendants Stuart and Maulsby answered said bill, and the depositions of the plaintiffs, A. E. Hoult and Samuel T. Sherwood, were taken and they each positively deny that they, or either of them, or the said Wm. Hoult, had any notice whatever of the trust-deeds executed to secure the debts of Stuart and Neely as aforesaid, or either of them, or of any claim of the said Maulsby to said land, until after the deeds aforesaid had been executed to them by said Commissioner Maxwell for the twenty-two and one half and sixty-four acres of land aforesaid. And no attempt was made by the defendants to prove that they, or either of them, had such notice prior to the time they respectively acquired the legal title to said twenty-two and one half and sixty-four acres of land.

The cause having been matured, and coming on to be finally heard, the court, by a decree entered on the 27th July, 1881, dissolved the plaintiffs' injunction in all respects except

as to the fifteen and one-half acres of land first purchased by the plaintiff, Samuel T. Sherwood, the defendants, declining to ask for a dissolution of the injunction as to said fifteen and one-half acres. From this decree the plaintiff obtained an appeal to this Court.

John Bassel for appellants cited the following authorities: *Doswell v. Buchanan*, 3 Leigh; 5 Leigh 627; Sher. Subrogation §§ 3, 28, 30, 34, 35; 16 W. Va. 791.

Edwin Maxwell for appellee, Maulsby, cited the following authorities: 3 Leigh 365; Code pp. 474, 475, §§ 4, 5, 10; 2 Lead. Cas. Eq. 203, 204; 2 Gratt. 280.

SNYDER, JUDGE, announced the opinion of the Court:

The circuit court having declined to dissolve the injunction as to the fifteen and one half acres first purchased by the appellant, Samuel T. Sherwood, the controversy in this Court is narrowed to the remaining forty-eight and one half acres of the sixty-four acres of said appellant and the twenty-two and one half acres of the appellants, W. E. & A. I. Hoult. The Hoult acquired a complete equitable title to the said twenty-two and one-half acres before any equity in favor of any of the appellees attached to the land, and in that regard they are in a better situation than the appellant, Samuel T. Sherwood, who acquired both the equitable and legal title to his forty-eight and one half acres after the equities the appellees had attached. The legal title to the twenty-two and one half acres was conferred on the Hoult after the trust deeds were executed in favor of the appellees. If, however, the title of the appellant, Samuel T. Sherwood, to the said forty-eight and one half acres is paramount to the claim of the appellees, Stuart and Maulsby, then it follows necessarily that the title of the Hoult to said twenty-two and one half acres must, also, be superior to said claims.

I do not deem it necessary to refer to the fact that, at least a part of the purchase-money for the said forty-eight and one half acres was paid to Commissioner Maxwell in discharge of the lien on the land for the original purchase, because in my opinion the case may be disposed of without such reference.

"A purchaser shall not, under this chapter, or chapter 75, be affected by the record of a deed or contract made by a person under whom his title is not derived, nor by the record of deed or contract made by any person before the date of a deed or contract made to or with such person, which is duly admitted to record, and from which the title of such person is derived." Section 10 chapter 74, Code, p. 475.

This provision of the code was first introduced in the revision of 1849, and in a note by the revisors it appears that the first part of the section was adopted to carry into effect the views of Chancellor Kent in *Murray v. Ballou*, 1 Johns. Ch. 574, that a purchaser is not required to take notice of a record by a person under whom his title is not derived. And the second part was framed to settle the doctrine of constructive notice affirmed by a divided court in *Doswell v. Buchanan*, 3 Leigh 365.

In *Doswell v. Buchanan*, a person in possession of lands, to which he had an equitable title, made a deed of trust upon it which was recorded. Afterwards such person acquired the legal title, and then conveyed the land to a purchaser for valuable consideration, who had no knowledge of the trust deed. It was held, that the subsequent purchaser took the land unaffected by the trust deed.

The case at bar, however, comes within the rule laid down in *Murray v. Ballou*, *supra*, and declared in the first part of the section of the statute, that "a purchaser shall not be affected by the record of a deed or contract made by a person under whom his title is not derived." The word "title" here used, being without qualification necessarily means a complete or legal title. Thus the title of the appellant, Samuel T. Sherwood, to the said forty-eight and one half acres was derived from Commissioner Maxwell, while the trust deeds were made by Daniel Sherwood. Consequently, said trust deeds having been made by a person under whom the title of said appellant to the forty-eight and one half acres is not derived, the record of said deeds, by the terms of the statute, cannot affect the title of said appellant to said land, and his title thereto must be defeated by the appellees, if at all, upon the general principles of equity unaffected by the recording of said deeds.

It is well settled that a purchaser for a valuable consideration, without notice of a prior equitable right, obtaining the legal estate or title at the time of his purchase, or before he has notice of such prior equity, will be entitled to priority of equity, as well as at law, according to the maxim, "where equities are equal the law shall prevail." *Basset v. Nosworth*, 2 Lead. Cas. Eq. 1; *Warner v. Winslow*, 1 Sandf. Ch. 48.

While on the one hand, notice of a prior equity, given at a time before the completion of the purchase, will invalidate steps which may be taken to complete it (*Murray v. Finsterlins*, Johns. Chy. 155; *Wormly v. Wormly*, 8 Wheat. 421), yet on the other, when it is once completed, and the character of a bona fide purchaser acquired, notice will not be a bar to any future steps, necessary for protecting and securing what has been purchased. He who buys an equitable title in ignorance of its nature, and under the belief that he is getting a good legal title, may, therefore, protect himself, by getting in the legal title, even where the effect is wholly to exclude equities prior to his own. *Baggarly v. Gaither*, 2 Jones Eq. 80; *Boone v. Chiles*, 10 Pet. 177; *Williamson v. Gordon*, 5 Munt. 257; *Tenn. Mutual Asso. So. v. Stone*, 3 Leigh 218; *Cox v. Romaine*, Gratt. 27; *Bayley v. Greenleaf*, 7 Wheat. 46; *Camden v. Harris*, 15 W. Va. 554.

In the case before us the appellant, Samuel T. Sherwood, was not only a complete purchaser by having paid the purchase money and been placed in possession of the land, but he had also acquired the legal title before notice of the equitable claims of the appellees. Therefore, under the least favorable view of the doctrine of equity relating to bona fide purchasers, his title to the said forty-eight and one half acres of land must prevail over the equities of the appellees, Stuart and Maulsby. And his title being paramount to that of the said appellees, and the appellants, W. E. and A. E. Houlton, having an equally valid legal title to the twenty-two and one half acres and an equity anterior to that of the appellees, the title to said twenty-two and one half acres is, of course, superior to and must also prevail over that of said appellees.

I am, therefore, of opinion that the circuit court erred in dissolving the plaintiffs' injunction as to any part of the sixty-four acres of the appellant, Samuel T. Sherwood, or to

twenty-two and one half acres of the said A. E. and W. E. Hoult, and for this error the decree of said court, of July 27, 1881, must be reversed with cost to the appellants against the appellees, other than Michael Donahue, trustee. And this Court, proceeding to pronounce such decree as said circuit court should have entered, doth order and decree, that the injunction awarded to the plaintiffs on the 19th day of April, 1881, be made perpetual and that the defendants, other than Michael Donahue, trustee, pay to the plaintiffs their costs in the said circuit court expended.

JUDGES JOHNSON AND GREEN CONCURRED.

DECREE REVERSED.

WHEELING.

VINAL, SPECIAL RECEIVER, v. GILMAN.

Submitted June 20, 1882—Decided March 24, 1883.

(*WOODS, JUDGE, Absent.)

1. A book of original entry, in which an entry is made in the usual course of business at the time of the transaction of matters within the personal knowledge of the book-keeper, may be used as evidence on the trial of a suit, if the book-keeper be dead at the time of the trial or a non-resident of the State, or if he be unable to be produced as a witness because of any other reason, as for instance insanity. (p. 309.)
2. But if the book-keeper be living and the court is able to enforce his attendance, the book cannot be used as evidence, unless his testimony as a witness also accompanies its production. (p. 312.)
3. Such book is received as evidence not only from the necessity of the case, but also because it is a part of the *res gestae* and general convenience compels its admittance, and hence it should be admitted without the book-keeper being examined as a witness, whenever the court can not compel this attendance, as when he is a non-resident. (p. 311.)
4. If the book itself be in the possession of a person, who is a non-resident of the State, so that its production can not be compelled by the court, a copy of any such entry in it as answers

*Case submitted before Judge W. took his seat on the bench.

21	301
37	400
21	301
49	200
21	301
50	64

the above description may be used as secondary evidence when it is proven, that it has been examined by a witness and compared with the original entry, and proven to be an exact copy. (p. 314.)

5. Such an entry in such a book stands on essentially distinct ground from a mere private entry of a person ; such private entry itself never being evidence, though it may be used by a witness to refresh his memory. (p. 309)

Writ of error and *supersedeas* to a judgment of the circuit court of the county of Wood, rendered on the 24th day of May, 1881, in an action at law in said court then pending wherein John F. Vinal, special receiver, was plaintiff, and J. C. Gilman was defendant, allowed upon the petition of said Gilman.

Hon. James M. Jackson, judge of the fifth judicial circuit, rendered the judgment complained of.

GREEN, JUDGE, furnishes the following statement of the case :

In 1879 John F. Vinal, receiver of the court in a certain case, brought an action of *assumpsit* against I. C. Gilman in the circuit court of Wood county for the use of various items of personal property, which were in charge of said receiver. The declaration contained all the usual common counts, and with it was filed a bill of particulars, which had among its items of charge three items, with reference to which certain evidence was received and permitted to be given to the jury against the objection of the defendant; and as the only question in controversy before this Court is the question, whether this evidence in reference to these three items should have been permitted to go to the jury, I shall state only so much of the case as will fully show, what are the merits of the controversy in this Court.

These three items are thus stated in the bill of particulars: "May 3, 1879, to the use of one one thousand barrel tank No. 2, from January 15, 1872, eight hundred dollars;" "May 3, 1879, to the use of one eight hundred barrel tank from January 15, 1872, six hundred and forty dollars," and "May 3, 1879, to the use of one engine and boiler from Bankers' well from January 15, 1872, five hundred dollars." Plaintiff

of *non-assumpsit* and the statute of limitations were filed and replied to generally and the issues joined, and on May 15, 1881, the jury found a verdict for the plaintiff for one thousand and five hundred dollars, and on May 24, 1881, the court overruled the motion of the defendant for a new trial and rendered judgment against him pursuant to this verdict.

One bill of exceptions was taken by the defendant during the progress of this trial, from which we learn, that the evidence of the plaintiff tended to prove, that the defendant, Gilman, used certain property which was in the charge of the plaintiff, as such receiver, and received the rents of it, and that of the property so used by the defendant, Gilman, were the items of personal property above named in these three items of the bill of particulars above copied, and gave proof also of the value of the use of this property for the time it was used by Gilman, while it was in the charge of the plaintiff as receiver. The defendant's evidence tended to contradict this in part at least, and on the evidence produced on each side as to the property named in these three items of the bill of particulars, the rights of the parties depended and turned upon whether the property named in these three items was or was not turned over on January 15, 1872, by Gilman and Shakely to B. G. Compton, agent for the West Virginia Oil and Oil Land Company. And in reference to this question this bill of exception proceeds as follows :

"The said defendant, further to maintain and prove the issues upon his part, offered his own testimony to prove that some time in the summer of 1871 he was directed by Frank A. Boyd, one of the firm of Wood & Boyd, in the chancery cause aforesaid, to turn over to B. S. Compton, as president of the said West Virginia Oil and Oil Land Company, the said lease and all the property thereon (which statement was contradicted by the said Frank A. Boyd in his testimony), and also gave evidence tending to show that in pursuance of said direction said defendant testified that he and Shakely had surrendered the said lease and turned over the property thereon save and excepting the one thousand barrel tank, the eight hundred barrel tank and the boiler at the Banner well mentioned in said plaintiff's account filed with his declaration in this cause, to the West Virginia Oil and Oil Land

Company, the same being received by one B. G. Compton, an agent thereof, which, as to said exceptions and reservation of said tanks and boiler at the Banner well was denied by said Shakely. And said defendant also gave evidence tending to prove that the said one thousand and eight hundred barrel oil tanks and the boiler at the Banner well were not turned over to said company, because the said defendant claimed that he had become the owner thereof by purchasing the same at the sales made for taxes assessed against the property of said Wood & Boyd whilst he was in charge of the same.

"And the said defendant offered evidence tending to prove that at the time of turning over said property to B. G. Compton, agent as aforesaid, schedule in writing thereof was made and signed by said Gilman & Shakely, and delivered to said B. G. Compton as such agent. And the defendant having also offered and given evidence tending to prove that after said time the schedule was in possession of the West Virginia Oil and Oil Land Company, and had been lost or mislaid, the court permitted the defendant to testify before the jury as to the contents of said schedule, the said defendant giving his own testimony to prove that the said schedule contained a statement by items of all the personal property upon said lease except the one thousand and eight hundred barrel oil tanks and the boiler at the Banner well as above mentioned. And it being a fact in dispute, and material to the issue in this cause whether or not the said one thousand and eight hundred barrel oil tanks and boiler at the Banner well were turned over in fact to said West Virginia Oil and Oil Land Company, the plaintiff, in order to rebut the secondary evidence aforesaid offered by the defendant in reference to the number of tanks and kinds of property that were so alleged to have been turned over to said company, was called as a witness and testified as follows:

"I know B. G. Compton, and also know his hand-writing. He is now and has been for some time a non-resident of this State. The signature to the writing which I here produced, dated January 15, 1872, of 'B. G. Compton, late agent of West Virginia Oil and Oil Land Company,' is his genuine signature. He copied it from his book of original entries. I did not see the original schedules signed by Gilman

Shakely of the said property turned over by them to said B. G. Compton, as agent of the West Virginia Oil and Oil Land Company, and do not know of my own knowledge what property was so turned over. This paper was taken from a memorandum book which B. G. Compton had in his possession containing the list and inventory made at the time of the transaction of property which the defendant and Shakely were alleged to have turned over to said company, and which memorandum book I saw at the time this paper was copied therefrom, and which list as kept by said Compton in said book I read, and I know this to be an exact copy of the original list of said property 'as kept in said book.'

"And thereupon the plaintiff offered to read in connection with his testimony said paper writing to the jury as secondary evidence of the list of property so turned over to said company as aforesaid. To the reading of which paper writing the defendant, by his counsel, objected, and said objection being argued by counsel and considered by the court, was overruled. And the court permitted said paper writing to be read in evidence to and considered by the jury in connection with the testimony of the plaintiff, the same being in the words and figures following, to-wit:

"Invoice of property turned over by Gilman & Shakely:

"INVOICE.

[Copy.]

"Jan'y 15, '72.

"MEMO.—*Invoice* of Wood & Boyd's property turned over to W. Va. O. and O. L. Co., B. G. Compton, ag't, by Gilman & Shakely:

- 1 engine and boiler at Banner well.
- 1 enginehouse, rig, &c., " "
- 1 bar round iron, $\frac{1}{2}$ in. dia., Banner well.
- 1 50 bbl. tank, No. 1.
- 1 1,000 bbl. tank, No. 2.
- 1 800 " " " 3.
- 1 140 " " " 4.
- 1 1,300 " " " 5, at R. R., mouth of Lick Fork.
- 1 boiler at Cory well.
- 1 engine at Ohio State Oil Co.
- 334 ft. 2 $\frac{1}{2}$ in. tubing at Conkle & Wilde's well.
- 150 ft. 1 $\frac{1}{2}$ in. gas pipe at McGee well.
- 1 2 $\frac{1}{2}$ in. wkg. bbl. at Gilman's house.
- 15 joints 2 $\frac{1}{2}$ in. light tubing at Banner well.
- 406 " 2 in. tubing at Tip Top well (Union acc't.).
- 216 " 2 in., No. 6 well, Lick Fork.

- 4 ps. 2 in , No. 6 well, lead line.
- 1 anvil at Carl and Cuthbert's.
- 1 vise at Petroleum.
- 1 auger stem at D. M. Shakely's.
- 1 sinker bar on South side.
- 1 *pr. pr. jars jars* on South Side.
- 1 broad-axe, Rob't Roy well.
- 1 pr. 2½ in. clamps, Carl & Cuthbert.
- 1 " 2½ " " Col. Vinal.
- 1 2½ in. auger, Petroleum.
- 3 augers at D. M. Shakely's.
- 1 tank, No. 6, Lick Fork, 228.
- 2 temper screws, one at D. M. Shakely's, one at Banner well.
- 1 tank at W. Va., pumping station at Lick Fork, 500 bbls.
- 1 bull wheel at Carl & Cuthbert's Root Hog well.

"B. G. COMPTON,
"Late Agent of W. Va. O. & O. L. Co.

"The court remarking to the jury that it permitted said paper-writing to be read not as conclusive but as secondary evidence in connection with other evidence in the cause, as to the fact of the kind and amount of property the said Gilman and Shakely turned over to the West Virginia Oil and Oil Land Company, the original paper concerning the same being lost; to which ruling and opinion of the court permitting said paper writing to be read in evidence to and considered by the jury for any purpose, the defendant, by his counsel, excepted, and this his bill of exceptions tendered, and prays that the same may be signed and saved to him and made part of the record in this cause, which is accordingly done."

There was no ground for asking a new trial, except the supposed error of the court in admitting this invoice as evidence. The defendant has been awarded a writ of error and *supersedeas* to the judgment of the circuit court on this verdict of the jury.

Walter S. Sands for plaintiff in error cited the following authorities: 2 Bish. Ev. § 483 and cases there cited; 1 Smith Lead. Cas. 510; 5 Wend. 301; 3 Barb. 120; *Id.* 528; Little Sel. Cas. 388; 6 Pick. 222; 8 East. 273; 11 Gratt. 527; 1 Greenl. Ev. § 115; 8 Wheat. 326; 15 Mass. 350; 15 Vt. 178; 4 Hill 537; 6 Cow. 162; 16 Wend. 595; 4 N. Y. 170; 1 Greenl. Ev. § 84 note; 20 Wall. 226; 1 Starkie Ev. (3d ed.)

356; 1 Greenl. Ev. §§ 124, 436, 437; 2 Saund. Pl. Ev. (part 2) 851.

John A. Hutchinson for defendant in error cited the following authorities: 10 Ind. 125; 1 Greenl. Ev. § 84; 3 Ohio 107; 10 B. Mon. 115; 12 Minn. 502; 8 Ia. 298; 9 Wheat. 581; 8 Post (Ala.) 546; 5 Cal. 467; 7 J. J. Marsh. 316; 4 Mete. (Ky.) 1; 1 Starkie Ev. 270; 2 East. 250; 1 Starkie N. P. 90; 6 Pet. 352; 1 Whart. Ev. §§ 130, 131, 133; *Id.* § 94 and cases cited; 2 M. and R. 433; 20 Wall. 134; 2 McCord 349; 15 Md. 523; 8 Watts 77; 1 Binn. 234; 10 Serg. & R. 155; 2 Watts & S. 137; *Bank v. Officer* 12 Serg. & R.; 18 Wall. 516; 20 Wall. 134; 41 Conn. 107; 68 Pa. St. 267; 35 Vt. 195; 21 Ohio St. 653; 22 Minn. 18; 15 Am. Dec. 195; 9 Pet. 663.

GREEN, JUDGE, announced the opinion of the Court:

The main question in dispute before the jury on the trial of this case was, "whether or not the two tanks of one thousand barrels and eight hundred barrels respectively and the boiler at the Banner well were included in the property, which was turned over by Gilman and Shakely to B. G. Compton, as the agent and manager of the West Virginia Oil and Oil Land Company. The defendant Gilman insisting, that these items of property were not in point of fact so turned over, and the plaintiff insisting, that they were. To prove that they were not the defendant, Gilman, offered evidence tending to prove, that at the time of the turning over of said property to B. G. Compton, as agent of said company, a schedule in writing of the property was made out and signed by Gilman and Shakely and delivered to Compton as such agent, and that it had been lost and the defendant, Gilman, proved the contents of this paper stating, that these two tanks and boiler were not in this schedule of the property, which was signed by Gilman and Shakely.

The plaintiff himself then testified, that Compton was and for some time past had been a non-resident of the State; that he had procured a statement from Compton of the invoice of the property, which was so turned over by Gilman and Shakely to him as agent of said company, which invoice

was produced and shown to the jury, and on it was mentioned these two tanks and this boiler of the Banner well; that this invoice thus produced was taken from a book, which Compton had in his possession containing the inventory made at the time this property was so turned over, and that the witness saw this invoice on said book and knew that the invoice produced and shown to the jury, was an exact copy of the original list of said property as kept in this book.

The defendant, Gilman, objected then to the reading of this invoice to the jury, but the court permitted it to be read, and the only question presented by the record for our decision in this case is, did the court err in thus permitting this invoice to be read.

To determine this question, we must determine the character of this entry in this book made by Compton of this invoice. Was it an original entry or was it a copy of the inventory of this property, which had been signed by Gilman and Shakely when they turned over this property to Compton, as the agent of said company? This, it seems to me, is satisfactorily answered by the paper itself, which was produced. It commences: "Invoice of Woods & Boyd's property turned over to West Virginia Oil and Oil Land Company, B. G. Compton agent, by Gilman and Shakely." Then follows a simple list of the property not signed at all. This paper is on its face not a copy of the schedule signed by Gilman and Shakely and handed over by them to B. G. Compton, and it does not profess to be a copy of such a paper. It professes to be an original invoice of this property made out it is proven, in the handwriting of Compton, and as he had the possession and control of this property, it must be regarded as having been made out from inspection of the property, as other invoices are made out; he being the agent and clerk of this company and having the charge and control of this property, it was obviously in his line of duty as such agent to make out in a book, in which the other property of this company in his charge was listed, a list of this property which then for the first time came under his charge as the agent of the company; and it is presumed, that this was an entry in this book in the regular and proper discharge of his duty as such agent. It was not only not a copy of the paper,

which Gilman and Shakely had signed, but it was not even a private memorandum of B. G. Gilman; it was a regular business entry made by him as agent of the West Virginia Oil and Oil Land Company, in the regular transaction of business at the time the transactions occurred, which is recorded in such entry. Such an entry stands on a very different footing from a private memorandum or entry, which has been made by a witness of any transaction. Though the party who made such private memorandum or entry be dead, it can never be used as evidence; and under no circumstances is such private memorandum or entry held to be in *itself* evidence.

But when the witness is living, it may be examined by him to refresh his memory though it is never *itself* evidence, which can be submitted to the jury to prove the facts recorded in such memorandum. When it is permitted to be examined and read by the witness, still it is the statement of the witness and not the private memorandum or entry, which is the evidence. See *Kensington v. Inglis et al.*, 8 East. 274; *Harrison v. Middleton*, 11 Gratt. 544; *O'Neale v. Walton*, 1 Rich. 234; *Sasseer v. The Farmers Bank*, 4 Md. 418; *Maungham v. Hubbard & Robinson*, 8 Barn. & Cres. 14. It is otherwise when the memorandum or entry is not a private one, but is one made in the usual course of business by a clerk or agent. For such memorandum or entry is held to be admissible as evidence, after the death of such clerk or agent, on proof of his hand-writing even though the entry be not contrary to the interest of the party who made the memorandum or entry.

It is sufficient, that the entry was made at the time of the occurrence in the usual course of business, to make it evidence on proof of the hand-writing of the party who made it, and that he is dead. See *Doe v. Turford*, 3 B. & Ad. 890; *Price v. The Earl of Torrington*, 1 Salkel 285, and notes thereon in Smith Leading Cas. vol. 1, side page 390; *Lewis v. Norton*, 1 Wash. 76; *Welsh v. Barrett*, 15 Mass. 380. And when the party is living, who made such an entry in the regular course of business, though he remembers and can testify nothing about the facts recorded in the entry, but simply testifies that he made the entry in the usual course of

business at the time of the transaction, such entry is of *itself* primary evidence of the facts recorded, though the witness be living and testifies in court if he knows, that he made the entry in the regular course of business. See *Spann v. Baltzell*, 1 Fla. 302-321; *Farmers & Mechanics Bank v. Borac* 1 Rawle 152; *Bank of Monroe v. Culver*, 2 Hill N. Y. 532.

Upon these and other authorities I think it is clear, that if B. G. Compton had been dead, this memorandum book kept by him as the agent and manager of the West Virginia Oil and Oil Land Company, could have been produced and on the proof of his hand writing, this invoice and entry could have been read as evidence to the jury to prove the facts recorded in this entry.

The next enquiry is, whether the fact that B. G. Compton was a non-resident of this State, and could not therefore be compelled by the plaintiff to attend at the trial as a witness, would when proven, have justified the introduction of the invoice and entry as though he were dead. It has in many cases been held by courts—or intimated by *dicta* of Judges, that under such circumstances the book so kept and the entry in it, may be produced in court and submitted to the jury as evidence of the facts recorded in the entry, on the proof of the hand writing of the book-keeper, though he be not dead, if he resides and is out of the State. *Elms v. Cheris*, 2 McCord (S. C.) 349; *Trun. v. Rogers*, 1 Bay 480; *Reynold's adm'r of Alex. Paul v. Manning, Stimpson & Co.*, 15 Md. 523, 524; *Alter v. Berghans*, 8 Watts 77; *Crouse et al. v. Miller*, 10 Serg. & Rawle 158; *Chaffee & Co. v. United States*, 18 Wallace 541; *Cummings v. Fallum*, 13 Vt. 434; *Cummings & Manning v. Fallum*, 13 Vt. 440; *Burton v. Driggs*, 20 Wallace 134; *Bartholomew v. Farrell*, 41 Con. 107.

It has been held, that the temporary absence from the State of the party who made the entry, though he was a resident of the State, would justify the reading of the entries from the book if the hand-writing of the book-keeper was proven. See *Hay v. Kramer*, 2 Watts and Serg. 138; and in *Holbrook v. Gay*, 6 Cush. 215, it was held that such entries could be read if the book-keeper was insane. See also, *Chaffee v. United States*, 18 Wal. 541, and *Union Bank v. Knapp*, 3 Pick 96. But, there are decisions of courts or

obiter dicta of Judges to the contrary and which hold, that if the book-keeper be not dead but only absent from the State, whether as a non-resident or temporarily, the entries in a book can never be read as evidence when he is not produced as a witness at the trial or when his deposition has not been taken. See *Cooper v. Marsden*, Esp. 1; *Welsh v. Barrit*, 15 Mass. 380 (top page 306); *Merrill v. The Ithaca & Oswego Rail Road Co.*, 16 Wend. 600; *Brewster v. Doane et al.*, 2 Hill 537; *County of Mahaska v. Ingalls*, 16 Ia. 95; *Monroe v. Andrews & Brothers*, 5 Porter (Ala.) 107.

These cases proceed upon the basis, that the rule, which permits the introduction of entries as evidence in any case, is based only on the *necessity* of permitting it, in order that the ends of justice may not be defeated and when it is impossible in the nature of the case to produce better proof, as when the person, who kept the book and made the entries in the regular course of business, is dead; but that, when he is living, it is necessary to produce him or take his deposition in all cases, because it would be dangerous to dispense with his evidence and might lead to frauds, when there could be no responsibility for false entries, which then would be, if they were testified to by him on oath, as his testimony would then be given under the liability of being punished, if he should commit perjury; and that it would therefore be unsafe to admit books as evidence in any case where it could possibly be avoided, unless the parties had the opportunity of examining the book-keeper on oath.

There is considerable force in this reasoning, and certainly the rule permitting books to be used as evidence should be carefully confined within proper limits. But it is not true, that the allowing of original entries in books, made at the time the transaction occurred in the usual and regular course of business by a party having personal knowledge of the transaction recorded, is permitted only from *necessity*; on the contrary other and very strong reasons are given for the admission of such entries as evidence; first, they are a part of the *res gestae*; secondly, general convenience is much promoted by their admissions as evidence. These reasons would lead to the conclusion, that such entries as above described, being proven to possess all these qualities, might properly be

admitted as evidence, whether the person who made them is produced in court or not, or whether his absence be accounted for or not, especially if it were proven, that his books were generally correctly kept. These entries are a part of the *res gestae* whether he be present at the trial or not, and the general rule is, that all the *res gestae* may and should be proven to promote the ends of justice. All the requisites of such an entry, which we have specified above, may be proven by others to exist as well as by the book-keeper. Others may prove the entry to have been an original entry, made at the time and in the regular course of business by one acquainted with the transaction recorded in the entry. Surely such an entry, as a part of these *res gestae*, is in itself valuable evidence in our search for truth, even when unaided by the evidence of the book-keeper; and it is regarded by the courts, as the decisions show, as legitimate evidence, though the book-keeper in no manner supports it by his testimony, as when he testifies he has no recollection of the facts which are recorded in the entry, and only testifies to its having been made by him under the circumstances we have pointed out. This could of course have been proved by others.

It would, it seems to me, be going too far to admit such entries as evidence when the book-keeper was living within the jurisdiction of the court, and no sufficient reason such as insanity or some other, was shown to them why he was not produced as a witness. For if it were allowed, such book-keeper might be purposely kept from being at the trial, the parties wanting to use the entries in the book knowing or believing that his testimony in connection with such entries would weaken his case. To prevent such conduct, which approximate to fraud, the courts have uniformly required the testimony of the book-keeper to accompany the production of the entries in such book as evidence, whenever the book-keeper was within the jurisdiction of the court, that is, within the State, and no sufficient reason is shown why he does not testify in connection with such entries.

I am not prepared to say that the temporary absence of the book-keeper from the State ought to dispense with the receipts of his being produced, though there is some authority therefor. It seems to me, however, that as this temporary

absence may be readily brought about for the very object of obtaining the advantage of using such entries, without the accompanying statement and explanation of the book-keeper, it would be probably unwise to relax the rule so far as to dispense with the presence of the witness when he was only temporarily absent from the State, especially as the alternative of a temporary continuance of the cause till his return to the State, might be but a small inconvenience.

If the party is a non-resident of the State and permanently absent from it, the case is far different, for in such case no suspicion can exist as to his being kept away for the purpose of obtaining an unfair advantage; his absence being shown to arise from his permanent non-residence. When this is the case, I can see no reason for requiring his deposition to be taken, before such an entry as I have described, can be used as evidence.

In a large majority of cases, his evidence would neither add to nor detract from the value of the entry as evidence *itself*; and the obtaining of his deposition in connection with the entry, that is with the original book of entries before him, as it would have to be to make his testimony of any value, would be often very costly and inconvenient and sometimes almost impossible, as when the book containing the entries was still being used as an account book. And if the book-keeper chose to do so, he would have it in his power to prevent the entries made by him from being used at all, no matter how essential their use was to the ends of justice. For in this State, and I presume in most if not in all of the States, the law provides no mode of compelling a witness to give his deposition in a suit pending in another State or in a foreign country. If the witness be in this State, the court may compel his attendance or may compel him to give his evidence, but if he be residing out of the State the court cannot compel him to testify, and for this reason if for none other, the original book of entries containing all the requirements I have specified, ought to be allowed to be used though the book-keeper's deposition has not been taken and he is not presumably present as a witness, when he is a non-resident of this State. This conclusion is sustained by the weight of authority, though we have seen that there is con-

siderable conflict among the cases. For a review of these authorities we note two. *Union Bank v. Knapp*, 3 Pick. 96, in American Decision Vol. 15 p. 192, 193 and 194.

Of course if the original book containing such entry is in the possession of any person, who is a resident in the State, its production should be required, as it could be compelled by the court, but if this book be in the possession of one not residing in the State, its production could not be compelled by the court, and in such a case on general principles, a copy taken from the original book, compared with the original entry and proven by a witness on the trial, is "the very best secondary evidence that can be obtained in the nature of the case, and should therefore be received as evidence; nor is it necessary in such case to prove, that any special efforts have been made to induce the person, who has the original book in his custody and who lives out of the State, to produce it at the trial. In most cases all such efforts would be failures, and as their success would not depend on the action of the party offering to introduce such entries as evidence, he is under no obligation to prove that he has made an effort to get the original book of entries."

In the case before us it is claimed, that it was not proven that this entry had all the requisites, which the law requires in order to make it evidence in itself. The first requisite is, that book must be a book of original entries. The court certifies that it was proven, that this invoice of property turned over by Gilman and Shakely, was copied from B. G. Compton's book of original entries, which was a memorandum book kept by B. G. Compton, the agent of the West Virginia Oil and Oil Land Company, and that it contained this list and inventory made at the time when the property was turned over by Gilman and Shakely to said company. The second requisite is that the entry should be made when the transaction occurred. It bears date on the book as of the time, at which the transaction took place; the witness says, that it was made at that time, and there is no room to doubt that this was a fact. The third requisite is, that the entry must be made in the regular course of one's business, duty or employment. The bill of exception shows, that it was proven that this property thus listed in this book kept by B. G.

Compton, was turned over to him by Gilman and Shakely, he receiving it as the agent of the West Virginia Oil and Oil Land Company, as stated on the face of this book. Obviously, this book containing a list of all the property of this company in his charge, was kept not for his private use, but as a book of the company; and assuredly these entries, from their very nature and from the relations which B. G. Compton held to said company, were business entries made by him as a part of his regular business, whereby he admitted and charged himself with having this property so listed in his custody, as the agent of said company. The last requisite is, personal knowledge of the transactions on the part of the one making the entry. This entry is proven to have been made by B. G. Compton, it being in his hand-writing and he being the person, as was proven, to whom this property was turned over by Gilman and Shakely; he of course knew this fact when it was done and what property was so turned over, and these are all the facts appearing by this entry.

This entry thus being one which was in itself evidence, and the original book of entry being, when it was last seen, in the hands of B. G. Compton a non-resident of this State, the presumption is of course, that it was still in his hands and therefore the copy produced of this entry, which had been compared with the original entry by the witness, who testified that it was an exact copy, was properly permitted to go to the jury as evidence. The only ground on which a new trial was asked for was, that the court erred in permitting the copy of this entry to go to the jury as evidence, and there being no error in his so doing, the motion for the new trial was properly overruled, and judgment entered against the defendant in accordance with the verdict of the jury.

The judgment of the circuit court of Wood county rendered May 24, 1881, must be affirmed; and the defendant in error John F. Vinal, special receiver, must recover of the plaintiff in error, J. C. Gilman, his costs about his defense in this Court expended and damages according to law, and the same must be certified to the clerk of the circuit court of Wood county.

JUDGES JOHNSON AND GREEN CONCURRED.

JUDGMENT AFFIRMED.

WHEELING.

FOREST v. STEPHENS.

Submitted January 24, 1883—Decided March 31, 1883.

21	316
48	400
21	316
55	120
156	131

A decree having been rendered in favor of the appellee upon a bill taken for confessed against the appellant, who never appeared in said cause, is a decree by default; and whatever errors there may be in said decree, could have been corrected by the court, which rendered the same, upon motion, in the manner prescribed by the 5th section of chapter 134 of the Code of West Virginia; and no such motion having been made, as required by the 6th section of said chapter, an appeal and *supersedeas* allowed to such decree must be dismissed, as improvidently awarded.

Appeal from a decree, with *supersedeas* to a portion thereof, of the circuit court of the county of Mason, rendered on the 13th day of May, 1881, in a cause in said court then pending, wherein J. G. Forest was plaintiff; and Washington Stephens and others were defendants, allowed upon the petition of the said Stephens.

Hon. F. A. Guthrie, judge of the seventh judicial circuit, rendered the decree appealed from.

WOODS, JUDGE, furnishes the following statement of the case:

In this cause the appellee, who was plaintiff below, filed his bill in the circuit court of Mason county at the April rules 1881 against the appellant, Washington Stephens, who was the principal defendant below, and others, alleged to be his creditors having judgment and trust-liens upon his lands, alleging that he had obtained two judgments against said Washington Stephens, as follows: one for thirty-eight dollars and fifteen cents including interest and costs, and one for thirty-nine and forty-two cents and fifteen dollars and thirty cents costs; that the other defendants had other judgments and trust-liens against him, all of which were subsisting liens on a tract of one hundred and fifty acres of land owned by him, and praying that the amounts and priorities of said

liens might be ascertained, and the land sold to satisfy the same. At May rules 1881, said bill was taken for confessed, the defendant, Washington Stephens, failing to appear or make any defence thereto; and at the May term, 1881, of the said circuit court the said cause was heard upon the bill so taken for confessed, and the court ascertained the said liens, fixed their priorities and decreed a sale of said land to satisfy to said lienors, including the said plaintiff, the amounts so ascertained to be due to them respectively, and appointed a commissioner to sell the said land upon the usual terms.

From this decree the said Washington Stephens obtained an appeal and *supersedeas* to this Court.

Henry J. Fisher for appellant cited the following authorities: Code, ch. 124 § 5: 3 W. Va. 386; 16 W. Va. 648; 17 W. Va. 670; 12 W. Va. 113; 28 Gratt. 646; 13 W. Va. 462; 3 W. Va. 423; 14 W. Va. 395.

Menager & Hogg for appellee cited 6 W. Va. 196, 7 W. Va. 593, 16 Gratt. 136 and 21 Gratt. 107.

WOODS, JUDGE, announced the opinion of the Court:

The appellant has assigned various errors, in the said decree, which are not necessary to be now considered, because, first, the decree complained of is a decree by default, and the alleged errors, if errors they be, could have all been corrected upon motion, by the said circuit court according to the provisions of the fifth section of chapter one hundred and thirty-four of the Code of West Virginia; and, secondly, because the said sixth section of said chapter expressly provides, that no "appeal, writ of error or *supersedeas* shall be allowed, or entertained by an appellate court or judge, for any matter, for which a judgment or decree is liable to be reversed or amended on motion, by the court which rendered it, or the judge thereof, until such motion be made and overruled in whole or in part."

The errors complained of being such, as might have been so corrected, and the appellant having failed to make such motion in said circuit court, the said appeal and *supersedeas*

allowed to the said appellant cannot be maintained. This is no longer an open question in this State, as this Court has repeatedly passed upon it, as will appear from the following cases: *Baker, &c. v. Western Mining & Manufacturing Co.*, 6 W. Va. 196; *Dickenson Ex'r v. Lewis*, 7 W. Va. 673; *Adamson v. Pearce*, 20 W. Va. 59.

We are therefore of opinion and accordingly adjudge, order and decree, that the said appeal and *supersedeas* be dismissed, as having been improvidently awarded, and that the appellant pay to the appellee, J. G. Foster, his costs by him about his defense in this behalf expended.

THE OTHER JUDGES CONCURRED.

APPEAL DISMISSED.

WHEELING.

HALL v. WEBB.

Submitted June 20, 1882—Decided March 31, 1883.

(*WOODS, JUDGE, Absent.)

1. The statute of limitations does not commence to run in favor of an occupant of land, while the title thereto is vested in the State. But the statute does commence to run in favor of such occupant against the grantee of the State from the date of the grant of the land so occupied. (p. 322.)
2. Where land had been granted by the State, and an adversary possession had commenced to run against the true owner, and subsequently such land became forfeited to the State under the delinquent land laws, such possession would not be adversary to the State or her grantee after the forfeiture, except from the time the land was re-granted or sold by the State. (p. 322.)
3. The act of the Legislature of this State, passed February 6, 1873, in so far as it attempts, in *actions for the recovery of land*, to exclude from the time fixed as the bar in such actions by the statute of limitations, the period from the 28th day of February, 1865, to the date of the passage of said act, is unconstitutional and inoperative as to actions which had become barred before the passage of said act. (p. 323.)

⁶Case submitted before Judge W. took his seat upon the bench.

Writ of error to a judgment of the circuit court of the county of Wood, rendered on the 18th day of April, 1879, in an action of ejectment in said court then pending, wherein Cyrus Hall was plaintiff, and Sylvester D. Webb was defendant, allowed upon the petition of said Hall.

Hon. James M. Jackson, judge of the fifth judicial circuit, rendered the judgment complained of.

The facts of the case are stated in the opinion of the Court.

Cyrus Hall for plaintiff in error cited the following authorities: 9 W. Va. 616; Code ch. 106 § 27; 4 W. Va. 138; 2 W. Va. 575; Cool. Con. Lim. 310; Ang. Lim. (5th Ed.) 3, 4, 5, 58-61.

R. S. Blair for defendant in error cited the following authorities: 9 W. Va. 629; 6 W. Va. 513; 12 Leigh 534; Cool. Const. Lim. 364.

SNYDER, JUDGE, announced the opinion of the Court.

Action of ejectment for five hundred acres of land on Goose creek in Ritchie county brought by Cyrus Hall, on the 29th day of July, 1874, against Sylvester D. Webb in the circuit court of Ritchie county and afterwards removed to the circuit court of Wood county where it was tried before a jury. After all the evidence had been heard the plaintiff demurred thereto in which demurrer the defendant joined and the jury found a verdict subject to the judgment of the court upon said demurrer to the evidence. On the 18th day of April, 1879, the court gave judgment for the defendant upon said demurrer, and from that judgment the plaintiff obtained a writ of error to this Court. The only error assigned here is, that the circuit court erred in rendering judgment for the defendant on the demurrer to the evidence, and that it should have given judgment for the plaintiff.

The evidence, as disclosed by the record here, is, in substance, as follows: The plaintiff and one Smith C. Hall by virtue of survey made for them, on the 26th day of August, 1856, obtained from the commonwealth of Virginia a grant, dated November 23, 1860, for three thousand seven hun-

dred acres of land lying on Goose creek a branch of Hugh river in Ritchie county which includes the five hundred acres of land in the plaintiff's declaration mentioned, and before the commencement of this action the said Smith C. Hall had conveyed his interest in said five hundred acres to the plaintiff. This constitutes the plaintiff's evidence of title to the land in controversy.

The defendant proved, that a grant for five thousand acres of land was issued, on the 9th day of January, 1786, by the commonwealth of Virginia to one John Hart, which grant was admitted covered the land in dispute; that a deed dated October 6, 1843, was executed by the clerk of the county court of Wood county to Josias M. Steed for two thousand three hundred acres of land on Goose creek in Wood county, which deed recites that said land, for the year 1838, had been assessed with taxes in the name of Jacob Moore, returned delinquent for the non-payment thereof and sold therefor in 1840, and purchased by said Steed; that by written contract, dated July 3, 1850, J. M. Steed sold and bound himself to convey to Levi Nutter a tract of five hundred acres of land on Goose creek in Ritchie county which is the land in controversy; that said Levi Nutter having died his son William Nutter by like contract, dated December 1851, sold and agreed to have conveyed to the defendant Webb, the said five hundred acres of land; that the defendant testified that he took possession of said five hundred acres under and about the date of his said purchase in December, 1851, claiming the same as his own, and that he lived on and occupied it continuously from that time up to the time he was testifying on the trial of this action, and that some time in the summer of 1860 he met the plaintiff and asked him if he had any claim on said land of defendant and he replied that he had not, that defendant had paid for it and he wanted him to have it; that he has frequently seen plaintiff before and after that time and plaintiff never set any claim to said land until the institution of this action; that the three thousand seven hundred acres of land in the grant to plaintiff and Smith C. Hall is embraced in the grant for five thousand acres to John Hart and said land was prior to the formation of Ritchie situated in Wood county.

the plaintiff to rebut the evidence of defendant read to jury a certificate from the auditor of Virginia which certifies that from the year 1805 to the year 1844 inclusive no more than five thousand acres of land was entered on the books of the commissioner of the revenue for Wood county in the name of John Hart, &c.; and he also read his affidavit that he could not truly make the affidavit prescribed by section 106 of chapter 106 of the Code of this State.

Nowhere appears in the record, either by parol evidence or by the description in the writings themselves, that the two thousand three hundred acres of land mentioned in the tax list was from the clerk of the county court of Wood county to J. M. Steed as M. Steed is any part of the five thousand acres of land mentioned in the contracts from John Hart, that any conveyance had ever been made by said Hart to Jacob Moore, or that the five hundred acres described in the contracts from J. M. Steed to Levi Nutter and from Wm. Nutter to defendant is any part of the two thousand three hundred acres.

This being all the evidence, did the court err in rendering judgment for the defendant on the demurrer thereto by the plaintiff?

The law is well settled in this State that upon a demurrer to the evidence, the demurrant must be treated as allowing full effect to all the evidence of the demurree, and admitting all facts directly proved by it, or that a jury might infer from it, and as waiving all the parol evidence on his part which contradicts that of the demurree, or the credit of which is impeached, and all inferences from his own evidence which do not necessarily flow from it, and if, thus considering the evidence, the court is satisfied that the preponderance is in favor of the demurrant he will be entitled to judgment upon his demurrer, otherwise the judgment must be in favor of the demurree. *Allen v. Bartlett*, 20 Va. 46.

Applying this rule to the evidence in the case before us, it clearly appears that the defendant was in the actual, open and continuous possession of the land in controversy from November, 1851, to the time of bringing this action on the 1st day of July, 1874—a period of over twenty-two years—claiming said land as his own adversely to the plaintiff under

a color of title. Thus assuming that the plaintiff had a valid title to the land—he proving no actual possession of any part of his land—his title became barred by the actual, open, continuous adverse possession of the defendant for a period of more than ten years, the statutory bar, unless the plaintiff can bring himself within some exception to the statute of limitations. This it is argued he has done, by insisting, *first*, that until he obtained his grant from the commonwealth, the statute did not operate in favor of the defendant, and *second*, by showing that he could not make the affidavit prescribed by section 27 of chapter 106 of the Code, and claiming by reason thereof that under chapter 28 of the Acts of 1872–3, the period from February 28, 1865, to February 6, 1873, must be excluded from the ten years prescribed as the statutory bar. If the plaintiff is entitled to have both these periods excluded from the ten years prescribed as the limitation in ejectment, then, the adverse possession of the defendant did not bar his right of entry at the time this action was brought and the judgment should have been in his favor, otherwise the judgment was properly rendered for the defendant.

It is a universal principle of law that time does not run against the State unless so declared in the statute which prescribes the limitation; and as our statute does not, in terms, or otherwise, refer to the State, there could be no adversary possession by the defendant while the title to the land remained in the State. *Shanks v. Lancaster*, 5 Gratt. 110; *Korner v. Rankin*, 11 *Id.* 420. And where land had been granted and an adversary possession had commenced to run against the true owner, if, subsequently, the land had become forfeited to the State under the delinquent land laws, such possession would not be adversary after the forfeiture nor until the land was regranted or sold by the State, against the State, or her grantee under title derived from such sale or grant. *Lavasser v. Washburn*, 11 Gratt. 572. But the statute does begin to run in favor of one in possession of ungranted lands of the State as soon as a grant issues to any one for such lands. *Adams v. Alkire*, 20 W. Va. 480; *Shanks v. Lancaster*, 5 Gratt. 110.

In the case at bar the defendant showed that the land in controversy had been granted to John Hart in 1786; but as

it was omitted from the commissioner's books from 1805 to 1844, it was forfeited and the title re-vested in the commonwealth, on the 1st day of November, 1836, under the Acts of the General Assembly of Virginia of February 27, 1835, and March 23, 1836. *Staats v. Board*, 10 Gratt. 400. The title, therefore, being in the commonwealth from the time of the forfeiture, the statute of limitations did not commence to run in favor of the defendant until the 23d day of November, 1860, the date of the grant to the plaintiff. But as the time between the said 23d day of November, 1860, and the date at which this action was instituted is more than ten years, the plaintiff's right of entry was still barred unless he can also exclude the time between the 28th day of February, 1865, and the 6th day of February, 1873, as provided by the act of February 6, 1873—chap. 28 of Acts 1872-3, p. 76. Is the plaintiff entitled to have said period excluded?

It is manifest that the language of said act of February 6, 1873, embraces all kinds of suits, including the action of ejectment; and consequently, if it is valid and binding upon the courts of this State, the said period therein mentioned must be excluded. *Huffman v. Alderson*, 9 W. Va. 616. The plaintiff obtained his grant from the commonwealth on the 23d day of November, 1860. At that time the defendant was in the actual and open possession of the land now in controversy and the plaintiff could then have instituted his action to recover it. The cause of action having arisen at that time, the plaintiff under the laws of this State had ten years within which to bring his action, thus giving him until the 23d day of November, 1870, and if he failed to bring his action within that time the law declared his right to recover the land absolutely barred. More than two years after his right to recover said land had become thus absolutely barred, the Legislature passed the said act of February 6, 1873, by which it is declared "That in computing the time within which *any civil suit*, motion to recover money, proceeding, &c. * * * by persons who could not truly make the affidavit prescribed by section 27 of chapter 106 of the Code, the period from the 28th of February, 1865, to the passage of this act (February 6, 1873), shall be excluded from such computation." The question now presented is, is said act,

when invoked in an action of ejectment for the recovery of land in a case in which such action had become barred by the laws then in force more than two years before said act was passed, a constitutional and valid statute?

In *Huffman v. Alderson*, 9 W. Va. 616, this Court held that said act, "when applied to actions on *express contracts*," is constitutional. In commenting upon said act, the Court, in its opinion in that case, says: "It is true that the Legislature, in the act under consideration, have gone further, and attempted to give an action not only where there was an express contract, but even in actions of detinue and *ejectment*. In this they may have transcended their constitutional power, for the Legislature has not a constitutional right to confer on a party a right of action, except under particular circumstances, though they may think it is morally right that such right of action should be conferred. To admit such a general right would be to subject the right of the citizen, to hold any property, to the caprice of the Legislature. The citizen would be deprived of his property by legislative action and without due process of law." 9 W. Va. 629-30. This decision was affirmed in *Keller v. McHuffman*, 15 W. Va. 64.

The case at bar may be readily distinguished from *Huffman v. Alderson*, just referred to. In fact, the distinction is fairly drawn in the quotation we have taken from that case. That was an action of debt—an action on an express contract—this is an action of trespass—an action of ejectment to recover the possession of land. The effect of the statutory bar in the two classes of actions is according to the uniform decisions of the courts essentially different. When an action on an express contract becomes barred by the statute of limitations the remedy only is regarded as taken away and the right still remains, and a number of decisions have declared that, under the peculiar circumstances of the cases, where good morals and justice require it, the Legislature may revive the remedy even after it has become completely barred by the statute. *Caperton v. Martin*, 4 W. Va. 138; *Wyatt v. Morris*, 2 Id. 575; *Bender v. Crawford*, 33 Tex. 745; *Bradford v. Shine*, 13 Fla. 393.

But where the action is to recover the possession of either real or personal property, and especially in cases of eject-

ment and detainee, the rule is very different. In such cases it is settled that, when the statutory bar attaches, not only the remedy for the recovery of the property is gone, but that the absolute title thereto is at once transferred to and thereby vested in the possessor of the property.

“When the period prescribed by statute has once run, so as to cut off the remedy one might have had for the recovery of *property* in the possession of another, the title to the property, irrespective of the original right, is regarded in law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retrospective effect, so as to disturb this title. It is vested as completely and perfectly, and is as safe from legislative interference as it would have been if it had been perfected in the owner by grant, or any species of assurance.” *Cooly’s Const. Lim.* 365 and cases cited; *Ang. on Lim.* § 380; *Newby v. Blakey*, 3 H. & M. 57; *Elam v. Bass*, 4 Munf. 301; *Pate v. Baker*, 8 Leigh 80; *Brent v. Chapman*, 5 Cranch 358; *Shelby v. Gray*, 11 Wheat. 361; *Leffingwell v. Warren*, 2 Black 599.

The said act of February 6, 1873, having been passed, as we have seen, more than two years after the title to the land sought to be recovered in this action had become vested in the defendant, under the principles of law above laid down, it must be declared inoperative in this action. To hold otherwise would be to admit that the Legislature, by a simple statute, could transfer the property of one person, who has a complete and perfect title thereto, to another. Such a power is not only clearly repugnant to natural right and justice, but is in direct violation of the bill of rights of this State, which declares that, “No person shall be deprived of life, liberty or property, without due process of law, and the judgment of his peers”—*Const. of W. Va.*, art. 3, sec. 10.

“By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass

under the form of an enactment is not therefore to be considered the law of the land." *Dartmouth College v. Woodward*, 4 Wheat. 519.

Legislation which attempts to transfer the property of one person to another, is not only contrary to the bill of rights but it is not legislative in its character and is therefore prohibited by the fifth article of our Constitution which provides that the legislative, executive, and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others." *Griffin v. Cunningham*, 20 Gratt. 31 and 51.

In any aspect of the case, we feel constrained to hold, that the said act of February 6, 1873, so far as it attempts to except the time therein mentioned, from the period fixed by the statute of limitations, *in actions for the recovery of land*, in cases in which the statutory bar had become complete before its enactment, is unconstitutional and inoperative. The right of entry in this action, having been barred before the passage of said act, the plaintiff is not entitled to exclude from the period prescribed by the statute of limitations the time mentioned in said act, and he is, therefore, not entitled to recover the land in his declaration mentioned. The judgment of the circuit court must, consequently, be affirmed with costs to the defendant in error and thirty dollars damages.

JUDGES JOHNSON AND GREEN CONCURRED.

JUDGMENT AFFIRMED.

WHEELING.

DEPUE v. SERGENT.

Submitted January 11, 1883—Decided March 31, 1883.

1. If the vendor agrees in writing to convey or by deed does convey to his vendee for a specific price a tract of land, described by metes and bounds as containing a specified number of acres "more or less," it is a sale in gross and not by the acre, and there is no ambiguity in the written contract or deed on this point.

21	326
34	596
21	326
47	668
21	326
57	52
57	126
57	127
57	130
21	326
61	236

though the price named be an exact multiple of the number of acres named. The case of *Besen v. Humphreys*, 75 Va. p. 196 disapproved, and the 15th syllabus in *Crislip, Guardian, v. Cain*, 18 W. Va. p. 441 approved. (p. 332.)

When a bill is filed to enforce a vendor's lien, and the answer asks an abatement of the price on account of a deficiency in the quantity of the land, because of fraud in the vendor in misrepresenting in the deed the quantity of the land, or because the land was sold by the acre and not in gross, such answer in either case alleges no new matter, which constitutes a claim for affirmative relief within the meaning of § 35 of ch. 125 of Code of West Virginia, but presents simply a defense to the plaintiff's demand, and therefore the court should not permit a special replication to such answer to be filed, but only a general replication. (p. 345)

On the hearing of such a case, when the answer claimed an abatement, because the contract was for a sale by the acre, the evidence shows, that the contract was in writing and that it was a sale in gross, but that the defendant is entitled to an abatement because of the fraud of the plaintiff in misrepresenting the quantity of the land in the tract sold, the court ought to permit the defendant to withdraw his answer and file another corresponding with the facts proven; but if the plaintiff replies generally to this answer, the court should allow the parties time to take testimony on the new issue thus made up. (p. 342.)

Where the contract of sale is in writing and unambiguous, no parol evidence of any character can be received to prove, that the parties intended a sale by the acre, if on the face of the contract it is a sale in gross. But, though the contract be in writing and unambiguous and is a sale in gross, yet, if the pleadings show that the issue between them is, whether the vendor did misrepresent the number of acres in the land by the contract to the prejudice of the vendee, any sort of parol evidence, which tends to establish such fraud, may be received, even though it tends to contradict the written contract, as by showing that the land was considered by the parties as sold by the acre. (p. 335.)

The general rule is, that if in case of a deficiency in quantity in the sale of land the vendee for any cause is entitled to an abatement of the price, this abatement should be at the rate of the average value per acre of the entire tract sold. (p. 345.)

Appeal and *supersedeas* to a decree of the circuit court of county of Roane, rendered on the 18th day of March, , in a suit in chancery in the said court then pending,

wherein Henry Depue was plaintiff and James M. Sergent was defendant, allowed upon the petition of said Sergent.

Hon. Joseph Smith, judge of the seventh judicial circuit, rendered the decree appealed from.

GREEN, JUDGE, furnishes the following statement of the case :

At August rules, 1877, Henry Depue filed his bill in the county court of Roane county against J. M. Sergent alleging, that on November 17, 1873, he sold and conveyed to said Sergent, by deed with general warranty of title, a tract of land described by metes and bounds in Roane county, containing as alleged in the deed, five hundred acres more or less for four thousand five hundred dollars, of which sum one thousand two hundred dollars was paid in cash and the balance was to be paid in deferred payments as named in the deed, all of which had been paid in except the last two, of six hundred and twenty-five dollars each, with interest from the date of said deed November 17, 1873; that one of these last two payments was due and wholly unpaid, as was evidenced by the bond of said Sergent filed with the bill; that a vendor's lien to secure these deferred payments was expressly reserved in the deed, an attested copy of which was filed with the bill, it having been duly recorded. The deed filed was correctly described in the bill, and it contains nothing except what was therein stated. The bill prayed an enforcement of this vendor's lien and asked general relief. The cause was properly removed to the circuit court of Roane county.

J. M. Sergent filed an answer to this bill alleging, that he had paid on the bond claimed to be then due, five hundred and seventy-five dollars; he says, that he purchased said lands at nine dollars per acre and that five hundred acres were sold to him, but that there was a deficiency in the quantity in the tract of seventy-three acres, and he claims an abatement of the purchase-money of six hundred and fifty-seven dollars and interest; and he prays, that these credits and abatement for this deficiency may be allowed him and asks for general relief.

The plaintiff filed a reply in writing to this answer claim-

ing, that the tract of land was sold in gross and not by the acre. He afterwards filed another reply in writing to this answer, in which he admits the payments claimed in the answer, except one of one hundred and seventy-five dollars, claimed in the answer to have been made on April 2, 1877, which is denied; and it repeats the allegations in the first special replication. He afterwards filed a third special reply to this answer, repeating again the allegations made in his former replies and adding, that this sale in gross of this land was made on October 29, 1873, and filing the agreement of sale, which corresponds with this deed.

The defendant, Sergeant, filed also what he calls an amended supplemental answer, in which he claims a payment of six hundred dollars in addition, made after the report of the commissioner had been returned and claiming, that he tendered at the same time eighty-five dollars, which would be in full satisfaction of the plaintiff's demands, but which he refused to take. This answer also excepts to the commissioner's report claiming, that it did not report the deficiency in the land to be as much as the evidence showed it to be by one acre and thirteen poles; and this answer also prays for general relief. This answer was replied to in writing by the plaintiff, Depue. He denies, that the eighty-five dollars was tendered to him in a legal manner and in such money or currency as he was bound to receive. He claims, that the one acre and thirteen poles claimed as a further deficiency in the quantity beyond that which the commissioner reported is unfounded, and that the one acre and thirteen poles are included in the land conveyed.

On September 5, 1878, the court made an order referring this cause to a commissioner "to ascertain, whether or not the said sale was in gross or by the acre, for a number of acres at a fixed price per acre, and to ascertain the number of acres in the tract and the amount of the defendant's payments on this land, as well as the amount due including the last payment, if that was due when the report was made."

The commissioner reported in September, 1879, that the tract of land contained four hundred and fifty-two acres, one rood and thirty poles, instead of five hundred acres, a deficiency of forty-seven acres, two roods and ten poles; that a

further deficiency of one acre and thirteen poles is claimed to exist which he disallows, because for reasons that he sets out he regarded it as included in the deed. He then says: "The commissioner is not entirely satisfied as to how far he should receive parol testimony when there is a plain written agreement. It is very evident to the commissioner, that the agreement clearly points out that the sale of the farm, made by the plaintiff to the defendant, was by the tract and for so much. This seems to be confirmed by the deed, which was accepted by the defendant. The commissioner, therefore, after giving careful consideration to all the evidence in the case is of opinion, that the sale was made as a tract of land, and not by the acre, for the sum of four thousand five hundred dollars, but that the defendant was led to believe, that there were five hundred acres or near that amount, is also clearly the opinion of the commissioner, although no exact number of acres were intended to be conveyed; but the defendant should have a reduction for shortage." He then states the account between the parties; allows all the payments claimed in his answer by the defendant, excepting only the payment of one hundred and seventy-five dollars, as of April 25, 1877, which the plaintiff denied in his reply; makes an abatement for deficiency in the quantity of the land of forty-seven acres, two roods and ten poles, at the average price nine dollars per acre, and finds that on August 14, 1879, there is due from the defendant to the plaintiff on this purchase six hundred and eighty dollars and one cent.

No exceptions were filed to this report by the plaintiff, and the defendant excepted to it only because the true deficiency should have been found to be forty-eight acres, two roods and twenty-three poles or one acre and thirteen poles more, which amounts to twelve dollars and ninety-four cents, as of August 14, 1879, and which should, it is claimed, be deducted from the amount reported to be due. The depositions taken justified the conclusion drawn from them by the commissioner, that it "goes to show that the sale was made by the acre." But when taken in connection with the written agreement and the deed, the conclusion drawn from all the evidence by the commissioner is sustained by an examination of it, that is, "that the sale was made as a tract of land, and not by the

acre, for the sum of four thousand five hundred dollars, but that the defendant was led to believe by the plaintiff that there was five hundred acres or near that amount in said tract."

The court by its decree on the 18th of March, 1880, sustained the defendant's exceptions to this report and fixed the deficiency at forty-eight acres, two roods and twenty-three poles as claimed by the defendant; but instead of allowing the abatement at the price of nine dollars per acre, the average price of the land, the court allowed only five dollars per acre for such deficiency. It also gave the credit for the six hundred dollars, admitted to have been paid after said report of the commissioner, and making these corrections in the report and allowing this credit, there is found to be due a balance from James M. Sergeant, to the plaintiff of two hundred and eighty-five dollars and fifty cents, for which it rendered a decree against him, and if not paid with certain costs within thirty days, a special commissioner thereby appointed, was required to sell said land or so much thereof as was necessary after a specified advertisement and on specified terms; and this special commissioner was required to give bond in the penalty of five hundred dollars conditioned as required by law, before acting as such commissioner.

From this decree the defendant, J. M. Sergeant, obtained an appeal and *supersedeas*. On March 11, 1882, this Court reversed this decree, approving it in all respects except, that it was held, that the deficiency should have been abated at the price of nine dollars per acre instead of five dollars. This reduced the balance due from J. M. Sergeant on the purchase of this land, from two hundred and eighty-five dollars and fifty cents to sixty-seven dollars and seventy-four cents as of March 18, 1880. But after this decree was rendered by this Court we had occasion during the same term of the Court to thoroughly consider the whole subject of abatement where there was a deficiency in land sold, in the case of *Crislip, Guardian v. Cain*, 19 W. Va. p. 488; and doubting the propriety of this decree rendered on a previous day of the same term, on March 11, 1882, because of the improper and defective pleadings in the case, though it might be entirely proper on the evidence had the pleadings been such as

they should have been, on April 22, 1882, we set aside this decree of March 11, 1882, and ordered this case to be reheard and reargued, which has been done.

George J. Walker for appellant cites the following authorities: 2 Story Eq. Juris. §§ 778, 779 and note; 1 Call 301; 4 Munf. 332; 2 W. Va. 347; 4 W. Va. 408; 8 W. Va. 496; 11 W. Va. 217.

Henry C. Flesher for appellee cites the following authorities: 21 Gratt. 132; 2 Rand. 51; 8 Leigh 9; 5 Call 1; 1 Munf. 330; 2 Lom. Dig. 63; 19 Gratt. 731; 7 W. Va. 263; 10 Leigh 39; 19 W. Va. 438.

GREEN, JUDGE, announced the opinion of the Court:

In this case, the written contract for the sale of the land under the hands and seals of the parties, is thus worded: "Henry Depue has this day sold to James M. Sergeant, a tract of land situated on Island run on the waters of Spring creek, containing five hundred acres more or less, for the sum and consideration of one thousand two hundred dollars cash paid in hand and three thousand three hundred dollars (to be paid in specified times with interest from date)." The deed dated the 17th day of November, 1873, executed by Depue and wife to Sergeant for this land, is as follows: "That for and in consideration of four thousand five hundred dollars, twelve hundred dollars of which is in hand paid, and the balance is to be paid at times specified in the deed, the parties of the first part (the grantors) grant, bargain, sell and convey to the party of the second part (grantee), the following described tract, (here follows the full description of the tract of land including its metes and bounds), containing five hundred acres more or less. The parties of the first part hereby expressly retain a vendor's lien on the tract hereby conveyed for the purchase-money above mentioned. The parties of the first part covenant to warrant generally the property hereby conveyed."

In *Crislip, Guardian, v. Cain*, 19 W. Va., p. 526 and 527, it is laid down, that "the decisions in Virginia and elsewhere

have uniformly held, that when a vendor sold by written contract a tract of land for a certain sum of money, describing the land and adding thereto, containing so many acres more or less, specifying them or any other mode of specifying the quantity, which shows that its exact quantity was not intended to be given, such a contract or deed has been invariably construed to be a contract in gross, and has not been construed to be a contract by the acre, nor has such indefinite specification of the quantity of land ever been construed as a warranty of the number of acres by the vendor and as a contract, thus binding him to make it good." This construction of such a contract, that it is a *sale in gross* and that there is no warranty in such a contract of the quantity, by the vendor, has in most cases been assumed and acted upon by the court as clear and indisputable, and no comment has generally been made on the subject; such contracts are not regarded in these respects, as being in any degree ambiguous. See *Stebbins v. Eddy*, 4 Mason 414; *Smith v. Evans*, 6 Binn. 102; *Glen v. Glen*, 4 Serg. and R. 488; *Wiatt v. Rose*, 16 N. J. Eq. 290; *Marrin v. Bennett*, 8 Paige 312; 26 Wend. 169; *Jackson v. McConnel*, 19 Wend. 175; *Jackson v. Moore*, 6 Cowen 706; *Lush v. Druse*, 4 Wend. 313; *Brown v. Parish*, 2 Dana 9; *Hampton v. Eubank*, 4 J. J. Marsh. 634; *Eubank v. Hampton*, 1 Dana 343-344; *Peden v. Owens*, Rice Eq. 55; *Whicker v. Crews*, 1 Ired. Eq. 351; *Galbreath v. Galbreath*, 5 Watts 146; *Williford v. Bentley*, 5 J. J. Marsh. 181; *Perkins v. Webster*, 2 N. H. 287; *How v. Bass*, 2 Mass. 382; *Hall v. Mayhew*, 15 Md. 551; *Innis v. McCrummin*, 12 Martin (La.) 425; *Leassier v. Dashiell*, 13 La. 151; *People v. Wilson*, 16 La. 185; *Morris Canal Co. v. Emmett*, 9 Paige 168; *Slothower v. Gordon*, 23 Md. 1; *Tyson v. Hardesty*, 29 Md. 305; 8 Cal. 76; *Johnson v. Taber*, 10 N. Y. 319; *Clark v. Carpenter*, 4 C. E. Green (N. J.) 328; *Zeringue v. Williams*, 15 La. Ann. 76; *Wear v. Parish*, 26 Ill. 240; *Winch v. Winchester*, 1 Ves. & Beam 385; and also these Virginia cases: *Jolliffe v. Hite*, 1 Call 301; *Anthony v. Oldacre*, 4 Call 489; *Nelson v. Mathews*, 2 H. & M. 164; *Hull v. Cunningham's Ex'or* 1 Munf. 330; *Grantlines v. Wight*, 2 Munf. 179; *Bedford v. Hickman*, 5 Call 236."

There is, as is here stated, no case, when by a written con-

tract or deed a party sells or conveys a certain tract of land described, for a certain price, and in describing this land says it contains a specified number of acres, more or less, in which the courts have ever held, that such contract or deed could be construed as a contract of sale by the acre, except a single case, which will be presently noticed. It is true, that in *Bierne v. Erskine*, 5 Leigh 59, when the words describing the quantities of land specified the *exact* quantities unqualified by the words "more or less" or any other words it was held that, if the price was an exact multiple of the *exact* number of acres named, the sale, which would otherwise have been clearly a sale in gross, was thereby rendered ambiguous. It would then still be *prima facie*, on the face of the deed, a contract of sale in gross and not by the acre, but being ambiguous, it might be shown to be a contract of sale by the acre by proof of the circumstances surrounding the sale and the subsequent *conduct* of the parties in carrying it out; but all other parol evidence was carefully excluded, as the character of a written contract can never be explained in this way by the oral declarations of the parties made either before, at the time of, or after the sale. See *Crislip, Guardian, v. Cain*, 19 W. Va. p. 527, 528 and 529.

It is true that where the words "more or less" were not added to the description of the quantity of the land, the court of appeals of Virginia in the case of *Benson v. Humphreys*, Law Journ. April, 1881, did hold, where the price was an exact multiple of the quantity, though it was not stated exactly but was qualified by the addition of the words "more or less," yet, that this was still a contract of sale by the acre. But this case met the express and decided disapproval of our Court, in *Crislip, Guardian, v. Cain*, 19 W. Va. p. 551 and 552. It is entirely unsustained by reason or authority in Virginia or elsewhere.

Our conclusion therefore is, that in the case before us on the very face of the deed and written contract, the sale was clearly a sale in gross of the tract of land for four thousand five hundred dollars, and not a sale by the acre; and this being the case, of course it could not be proven by any description of parol evidence and much less by the talk of parties to be a sale by the acre. The written contract, clear on its face,

could not be explained by any kind of parol evidence on principles of law universally acknowledged. When therefore the defendant in the case before us, filed his answer in this cause, in which he said, "that he purchased said land by the acre at nine dollars per acre and the plaintiff sold him five hundred acres at said price per acre," the plaintiff ought to have excepted to this portion of this answer. For the deed, which was filed with the bill as a part thereof showed conclusively as a matter of law, that this sale was not by the acre, but was a sale of the entire tract of land at the gross sum of four thousand five hundred dollars.

This question, whether this sale made in writing was a sale by the acre or a sale in gross, was a mere question of law to be determined by the court on an inspection of the written contract or deed. And therefore the court ought not to have permitted this allegation, that it was a sale by the acre to have been made in the answer, if it had been excepted to by the plaintiff, as it ought to have been. Misled however by some of the Virginia decisions rendered since the formation of this State, which have been disapproved since by this Court in *Crislip, Guardian, v. Cain*, 19 W. Va. p. 438, the circuit court erroneously treated this question, whether this sale though in writing, was a sale by the acre or in gross, as a question of fact and, that parol evidence would be received to determine this question; and therefore among other things, it directed its commissioner "to ascertain whether or not said sale was in gross or by the acre."

The commissioner very properly doubted, whether he could give any weight to parol evidence in determining this question and held it to be a sale in gross, as was evident on the face of the written contract as well as by the deed; but he was of opinion that the evidence showed, that the grantor Depue, led the grantee Sargent, to believe, that there were five hundred acres or near that amount in the tract sold, and that therefore the defendant had a right to an abatement on account of the deficiency in the tract of land. As the grantor had expressly alleged in his contract and deed, that there were in this tract of land five hundred acres, more or less, that is about five hundred acres of land, the grantee had a right to regard this as a statement made on the personal

knowledge of the grantor and to rely upon it; and as the evidence in the judgment of the commissioner showed, that he did rely upon this statement of the grantor and was thereby misled to his injury, the conclusion of the commissioner that he was entitled to an abatement for this reason, though the sale was of the tract in gross and not by the acre, is expressly sustained by this Court in *Crislip, Guardian, v. Cain*, 19 W. Va. p. 441, syllabus 15.

This conclusion was reached after a full examination of the authorities. See 19 W. Va. from page 485 to 557. But the difficulty in the way of the commissioner acting on this principle, or of the court rendering a decree based on these principles however correct in themselves is, that there had been no issue made up by the pleadings as to whether the vendee, Sergeant, relying on this allegation of the vendor, Depue, that there was about five hundred acres in this tract, had been induced to purchase for four thousand five hundred dollars and was thereby injured, as it contained less. The only issue on this subject had been, whether the sale of this tract of land was a sale in gross for four thousand five hundred dollars or a sale by the acre at nine dollars per acre. The commissioner had very properly reported, that it was a sale in gross of the entire tract for four thousand five hundred dollars, and not a sale by the acre. And as all the evidence which tended to show, that the vendee, Sergeant, had been misled by the positive allegations of the vendor, Depue, as to the quantity of the land and had been thereby injured, was in reference to a matter, which had never been put in issue by the pleadings and had not been referred to the commissioner, he could not properly report upon it nor could the court properly act on his report in reference to this matter; nor could it properly act upon it at all till the pleadings had been amended and this matter properly put in issue.

If it had been put in issue, as we think it ought yet to be permitted to the parties to do, then of course the plaintiff, the vendor, ought to be permitted by any sort of pertinent parol evidence to prove, that the vendee did not in point of fact rely on this statement of the vendor as to the quantity of land, and that he was not thereby deceived nor misled to his injury; and on the other hand the vendee, Sergeant, may in-

introduce any parol evidence he can, which tends to show, that he did rely on such statement of the vendor in regard to the quantity of land and was thereby misled to his injury, thus strengthening the *prima facie* presumption, which in law arises, that the purchaser did rely on the statement of the vendor, and agreed to pay the price he did for the tract of land, because of such reliance and was injured by having been misled, as the quantity turned out to be much less.

It is obvious, that while the parol declarations of the vendor, Depue, that the land had been sold by the acre, cannot be used to prove in contradiction of the written contract and deed, that the land was not sold by the gross as a tract for four thousand five hundred dollars, yet, such declarations do tend to show, that the vendee, Sergeant, in making the purchase had regard to the number of acres in the tract, and though he ultimately bought the tract in gross, yet, he was induced to do so by this reliance on the statement of the vendor, Depue, in his contract and deed, that the tract contained about five hundred acres. That this evidence is legitimate for such a purpose is stated in *Crislip, Guardian, v. Cain*, 19 W. Va. p. 548.

The principles, which we have here laid down, are fully discussed in that case, and are sustained by the great weight of authority and reason. It is true there have been decisions in Virginia, since the formation of our State, as well as occasional dicta of judges, which are inconsistent with these principles, but the old decisions in Virginia, as well as the decisions elsewhere, sustain these positions.

In Virginia, in modern times, the judges seem to have lost sight of the well established rule, that parol evidence can not be used to contradict a written contract, and also of the palpable difference between a vendee seeking an abatement for a deficiency, because the sale was by the acre, and the case, in which the vendee seeks such abatement, because he has been misled by the statement of the vendor in his written contract, made positively as to the quantity of land and presumed to have been made on his knowledge, and relying on this statement, he, the vendee, had to his injury been induced to give the price agreed upon for the tract of land in gross. As an instance of this disregard of established principles and

this confusion of thought, when the question has been, whether there should be an abatement for a deficiency where there has been a sale of land, I may refer to the opinion of Judge Staples in *Caldwell v. Craig*, 21 Gratt. 138, in which he says: "Many cases have been before this court involving the doctrine of compensation upon contracts for the sale of real estate. In many of them, parol evidence was received as to the true understanding of the parties, whether a sale in gross or by the acre was intended, notwithstanding the existence of written articles evidencing the contract. In *Jolliffe v. Hite*, 1 Call 301; in *Quesnel v. Woodlief et al.*, 6 Call 218; in *Fleet v. Hawkins*, 6 Munf. 188, and in *Grantland v. Wight*, 2 Munf. 179, such evidence was admitted without objection."

This reading of this opinion of Judge Staples, leaves on the mind the impression, that these cases had made an exception to the general rule, that no parol evidence can be received to contradict a written contract whenever the question involved was, whether the contract was for the sale of the land in gross or a sale of the land by the acre. An examination of these cases gives no countenance to such a construction. In all these cases, the vendees brought bills in equity against the vendors of the land alleging, that they had been misled by the statement of the vendors in their written contracts, as to the quantity of the land contained in the tract sold; and, that it having been since ascertained by the vendees, that there was a deficiency in the quantity, they asked either an abatement from the price or a refunding of a portion of it, when it had all been paid.

These cases as well as *Caldwell v. Craig*, were reviewed by this Court in *Crislip, Guardian, v. Cain*, 19 W. Va. from page 485 to 519, and on pages 549, 550 this conclusion is reached: That in these and in other cases, parol evidence was received as a matter of course, not to contradict as Judge Staples seems to think, the written contract for the sale of the land, but for a very different purpose for which it was obviously legitimate, that is, to prove that the vendee relied on the statement of the vendor as to the quantity of the lands, and was thereby induced to purchase the tract at a certain price, which resulted in his injury.

This being the real question in issue in these cases, the vendee sustained his position or strengthened it by proving, that in purchasing the tract he had especial regard to the quantities of land; and this he showed by proving, that in the preliminary negotiations, the proposition was to sell by the acre at such fixed price as would just equal the gross price he agreed to pay for the tract, if it was assumed to contain the number of acres named in the written contract. Subsequent declarations of the vendor, that this tract of land was sold at this price per acre, certainly tended to show, that the vendee agreed to give for the entire tract of land a certain sum, because it was valued at this price per acre, which would, if the quantity named in the deed had been correct, just make for the entire tract the gross sum named in the contract or deed.

This parol evidence obviously tended to show, that the vendee had been misled by the vendor to his injury, as to the quantity of land in the tract; and that it tended to establish the fraud of the vendor, which was the real basis of these suits. And as a matter of course this evidence was, as it ought to have been, received to establish this fraud, and not as Judge Staples seems to think, to contradict the written contract. His views in this case of *Caldwell v. Craig*, 21 Gratt. 132, must be regarded as really only *obiter dictum*, for the action in this case was on the written contract and the defense was, not that it was a sale by the acre, but that the vendee had been defrauded by the misrepresentations of the quantity of land in the tract, and therefore any parol evidence, which tended to establish this fraud, could be introduced. The parol evidence then in that case, was not introduced to contradict the written contract as Judge Staples seems to think, but for a far different purpose, that is, to establish a fraud, which was the real question in issue between the parties in that suit. Judge Staples in his opinion, seems to speak as if the real question in issue in that case was, whether the land was sold in gross or by the acre. Had this been true, clearly this parol evidence was not admissible; but the issue being, whether or not the vendor had defrauded the vendee, this parol evidence was very properly admitted, and no established rule of law was thereby violated.

The grounds on which such parol evidence as to its having

been spoken of as a sale by the acre, is received in such cause, where the issue is whether there was or was not fraud, is thus stated by this Court in *Crislip, Guardian, v. Cain*, 19 W. Va. p. 548: "Parol evidence including the oral declarations of parties before, at the time of and after the contract, may as a matter of course, be introduced to prove this misrepresentation, and to prove, that it was fraudulent and relied upon by the vendee, and that he was thereby induced to make the purchase at the price, which he paid or agreed to pay. And a common character of such evidence is to prove, that prior to the sale there were propositions to sell and buy by the acre, or that since the sale the parties spoke of it as a sale by the acre. This evidence is not received to alter or vary the written contract but to establish, that the vendee in buying fixed the price by the supposed number of acres thus establishing satisfactorily, that he relied on the vendor's statement of the quantity, and was by it induced to make the purchase at the price, which he paid; and this he must in some way establish, or he cannot recover, though a misrepresentation of the quantity was made by the vendor." But as I have before said this will be presumed from the written contract specifying the quantity as so many acres more or less. This of itself makes out a *prima facie* case of the vendee to recover or to have an abatement, when he proves a deficiency in the quantity, it being assumed *prima facie*, that he was misled to his injury by the positive statement in the deed or contract, that the land contained about a certain quantity, which statement the vendee has a right to assume was made on the personal knowledge of the vendor, and which therefore, he has a right to rely upon as correct.

This deception with injury to the vendee, is in law a fraud upon him, though the vendor honestly believed, that there was the quantity named in the deed in the tract sold in gross. For he can not say positively in his deed or contract, that there is about this quantity unless it be true, and merely because he believes it to be true, for in speaking thus positively he induces the vendee to believe, that he has personal knowledge of the truth of what he says; and if it turns out that he has no such knowledge, but

that there is a deficiency in the land, he has in law been guilty of a fraud and must make up the deficiency, provided the vendee trusted to and relied on his statement and was by it in point of fact deceived.

Our conclusion is therefore, that in this case, as the pleadings had made no issue upon the question, whether or no the vendee, Sergeant, had been misled by the vendor, Depue, to his injury, and induced to agree to give the four thousand five hundred dollars for the tract of land because of the vendor's assurance, that it contained about five hundred acres; all evidence tending to prove such fraud was inadmissible; and that all the evidence tending to show, that the vendor, Depue, had stated that this land was sold at nine dollars per acre, and that it contained five hundred acres, was of this character, and was therefore inadmissible upon the pleadings in the case, because it was parol evidence tending to contradict a written contract. But, if the issue had been such as above indicated, whether or no there was fraud in this misrepresentation of the quantity, then all this evidence would have been pertinent and proper.

The circuit court was, as was this Court when it decided this case formerly, misled doubtless by this opinion of Judge Staples and by these modern Virginia decisions, which have unfortunately confounded cases of tort resulting from misrepresentation of vendors, with cases of contracts for the sale of lands in gross or by the acre. After mature consideration, we regard such confusion as especially dangerous; nor is the mischief any less because in some cases the same results will be reached, whether the redress is sought because of the fraud of the vendor, or because the sale was by the acre and not in gross. For while this confounding of these matters in some cases, produces no injurious results, yet, in others it produces gross injustice and wrong. The basis of the relief asked being entirely different, it is of course necessary, that this basis should always be kept in view even though when it is determined in either case, that the vendee is entitled to redress, the measure of his relief may be the same.

In the case before as it is proven, that the vendee, Sergeant, was misled to his injury by the positive statement of the ven-

dor in his deed and written contract, that this tract of land contained about five hundred acres, when in point of fact it contained forty-eight acres, two roods and twenty-three poles less than thus represented; but there was no allegations in Sergeant's answer, that he had been thus misled and injured, and therefore while the pleadings remain as they now are, he cannot get any abatement because of this injury to him, which is not stated in the pleadings. For the court cannot grant relief in a case proven, which is entirely different from the case alleged. The decree of the circuit court of Roane county, being for these reasons erroneous, it must be reversed and annulled; and it remains for us to determine, whether we can now properly permit Sergeant to withdraw the answers he has filed, and file an answer in the cause, which when replied to generally would put in issue the question, whether the allegations in the written contract and deed made by Depue, that this tract contained five hundred acres, more or less, that is about five hundred acres, misled Sergeant to his injury, and induced him to give four thousand five hundred dollars for said tract of land. If this can be done when the pleadings are thus corrected, if the evidence which may be hereafter taken does not vary the case from what it now is, the decree rendered by this Court on March 11, 1882, would be the proper decree to be entered.

But if the new evidence, which Depue would have a right to introduce should prove, that Sergeant did not rely on his statement that this tract contained about five hundred acres, but upon his own knowledge, which was equal or inferior to that of Depue's; or if it proves, that Sergeant was in point of fact not induced to give four thousand five hundred dollars for this land because he believed it to contain five hundred acres, but would have given it though he did not know how many acres it contained, the quantity of land in the tract being to him a matter of indifference, then on such proof, Depue would be entitled to demand the whole price four thousand five hundred dollars, less what had been actually paid, and Sergeant would be entitled to no abatement for the deficiency in the quantity.

Can we now permit Sergeant to file another answer in lieu of that which he has filed in order to put in issue the real

question of controversy, which has been disclosed by the testimony in the case? Before the adoption of our Code, when an answer was always sworn to and when it not only served the purpose of pleading, but was also regarded as evidence, the general rule was that an answer would not be permitted to be amended after the evidence had been taken, because to permit that would be to allow the defendant to change his evidence to suit the exigencies of the case, which would be unjust to the plaintiff and would obviously tend to the encouragement of perjury. But, even then, an answer was sometimes allowed to be amended, or supplemented, or to be withdrawn, and a new answer filed when the amendment was in some small matter not material, unless the defendant by evidence showed to the court, that he had been surprised. See *Smith v. Babcock*, 3 Sumn. 583. As for instance, when a mistake was made in a date from inadvertency. But in general, very cogent circumstances had to appear before a court would permit an answer to be changed though even then where it was manifest, that the purposes of substantial justice required it, the court in its discretion might permit an answer to be changed; but when the new facts sought to be let in by the answer were wholly dependant on parol testimony, the reluctance of the court to permit the answer to be changed was greatly increased.

These are the general principles, which formerly governed the courts in permitting answers to be changed, as is laid down in *Smith v. Babcock et al.*, 3 Sumn. 583. But upon the hearing of a cause, the court may grant the same indulgence to a defendant as it would to a plaintiff. If it has appeared, that the defendant has not put in issue facts, which he ought to have put in, and which must necessarily be in issue to enable the court to determine the merits of the case, he will be allowed to amend his answer for the purpose of stating these facts. See Story's Equity Pleading section 902.

But the courts have been always very cautious in permitting such amendments at the hearing. As the bill in this case was not verified, the defendant was not bound to verify his answer by affidavit, and if verified, it would not have been evidence under the provisions of our Code. See Code

of W. Va. ch. 125, § 38. It is therefore obvious, that under this provision now in force in this State, one of the principal reasons for the courts being so reluctant to permit answers to be amended or changed, has been removed. And no doubt answers may be amended or changed with the leave of the court now, under circumstances wherein they could not be formerly so amended or changed. But, the court now ought not to permit answers to be changed or amended at the option of the defendant, and should only permit it when substantial justice required that it should be done.

It is clear however from the evidence in this case, that substantial justice does require, that the answer of the defendant should be withdrawn or taken from the file, and a new answer filed putting in issue facts, which he ought to have put in issue and which must necessarily be in issue, before the court could determine the real merits of the cause. For the circuit court has determined that such facts exist in this case, apparently from the evidence, and this Court in this respect, has concurred with the circuit court.

We are therefore of opinion, that instead of making a decree in the cause on March 18, 1880, the circuit court ought to have permitted the defendant to withdraw his answer and the amended and supplemental answer from the files, and to file a new answer, and that this should still be allowed, alleging, that by the deed of the plaintiff and by the written contract between the plaintiff and the defendant, of date October 29, 1873, a copy of which should be filed with this contract, the plaintiff conveyed and agreed to convey said tract of land to the defendant for the sum of four thousand five hundred dollars; that in said deed and agreement he represented, that there was in said tract of land five hundred acres, more or less, meaning thereby about five hundred acres; that relying on this representation of the quantity of land in said tract, the defendant agreed to pay for it four thousand five hundred dollars, each of the parties valuing said land at about nine dollars per acre, but, that it has been since ascertained, that there was a deficiency in the said tract of land to the extent of forty-eight acres, two roods and twenty-three poles, which at the average price of said land

amounts in value to four hundred and thirty-seven dollars and seventy-nine cents, which the defendant asks may be abated from said purchase-money as of November 17, 1873, and also setting out his credits in his said answer, allowed by the decree of March 18, 1880, as payments, and claiming these as credits on his purchase.

To this answer, the plaintiff should not be permitted to file a reply in writing or a special reply, but only a general replication; for these matters in this answer, are not new matters constituting a claim for *affirmative* relief, such as are referred to in section 35 of Code of West Virginia, page 604, but are purely and strictly matters of defense, which could not formerly have been claimed in a cross-bill.

When this cause is remanded to said circuit court, and this new answer filed and issue taken on it, the evidence which has already been taken without objection by either party, may be read as evidence on this new issue; but either party, who desire it, should be afforded the opportunity of taking any additional evidence on this new issue. And the court should determine the question, whether the defendant is entitled to any abatement upon the principles laid down by this Court in the case of *Crislip, Guardian, v. Cain*, 19 W. Va. p. 458. If it should on the evidence be of opinion, that the defendant was entitled to an abatement, it should allow him an abatement for a deficiency of forty-eight acres, two roods and twenty-three poles at the rate of nine dollars per acre, the average price of said tract of land; this being already ascertained to be the correct quantity of the deficiency by the circuit court, and which this Court on the evidence, is of opinion, is the correct quantity.

The circuit court in its decree of March 18, 1880, allowed this abatement at the rate of five dollars per acre. This was not we think the proper price to be put on this deficiency, if the defendant is entitled to an abatement therefor. The general rule in the case of an abatement on account of deficiency in the quantity of land sold, is to allow for the deficiency the average price of the whole land. See *Hull v. Cunningham*, 1 Munf. 330; *Nelson v. Mathews*, 2 H. & M. 164; *Lowther v. The Commonwealth*, 1 H. & M. 202; *Blessings, adm'r, v. Beatty*, 1 Rob. 287; *Crawford et als. v. McDaniel*, 1 Rob.

448; *Nicholas v. Cooper*, 2 W. Va. 347; *Stockton v. Union Oil & Coal Co.*, 4 W. Va. 273.

Though there are sometimes exceptions made for particular reasons to this general rule, yet, we see nothing in the facts of this case to justify a departure from this general rule. The tract sold was to a large extent unimproved; less than one hundred acres of it being improved, and there being on this improved part a small house.

When the case is remanded, the circuit court should strike from the records and file all the replies in writing of the plaintiffs, as well as the amended and supplemental answers of the defendant, as none of these ought to have been permitted to be filed. The amount of credits, which were allowed by the decree of March 18, 1880, as payments up to that time, should be again allowed and no new evidence should be permitted either as to the quantity of land in the tract, or as to the amount of the payments up to March 18, 1880, as the parties have been heard on these points and their questions have been decided by the circuit court, and its decision on these questions, is we think, sustained by the evidence.

Although this decree of March 18, 1880, for the reasons we have assigned must be reversed yet, the appellant, Sergeant, must pay the costs of the proceedings in this Court, as the appellee is the party substantially prevailing in this Court. For, in our judgment, the circuit court should have rendered no decree on March 18, 1880, but should have stricken out the special replications of the plaintiff and the amended and supplemental answer of the defendant, and should have permitted him to withdraw from the file his answer and to have filed such a new answer as we have indicated. And when issue had been joined on it and additional evidence taken, it might have been, and it may yet be, that the appellant, the defendant, will ultimately be held to be entitled to no abatement. This may not be very probable, but of this we cannot judge. And it must therefore be held, that the decree of March 18, 1882, was prejudicial to the plaintiff, the appellee, it being prematurely made and probably it might be found, that he is entitled to a decree against the appellant for a larger amount. The whole diffi-

culty in the cause has been created by the filing of an improper answer by the appellant, and he should pay the costs in this Court.

The decree of March 18, 1880, of the circuit court of the county of Roane, must be reversed, set aside and annulled as prematurely made; and the appellee, Henry Depue, as the party substantially prevailing, must recover of the appellant, J. M. Sergeant, his costs in this Court expended; and this cause is remanded to the circuit court of Roane county with instructions, that it shall be further proceeded with in the manner indicated and upon the principles laid down in this opinion, and further according to the principles governing courts of equity.

THE OTHER JUDGES CONCURRED.

DECREE REVERSED. CAUSE REMANDED.

WHEELING.

GRINNAN *et al.* v. EDWARDS *et al.*

Submitted January 25, 1883—Decided April 7, 1883.

1. Where a vendee, who before the beginning of the late civil war, and during the continuance thereof, resided in Madison county, Virginia, east of the Allegheny mountains, purchased a tract of land before the commencement of said war, situated in Fayette county, Virginia, from his vendor who then resided, and who during said war continued to reside, in the county of Kanawha, Virginia, partly for cash, and partly upon credit, payable in installments, which did not become due, until after the proclamation of the president of the United States, dated the 16th day of August, 1861, declaring certain States, and parts of States, in a state of insurrection against the government of the United States, the right of the said vendor to a specific execution of said contract from the 16th day of August, 1861, to the end of said war, was suspended; and during the same period, it became and *was unlawful* for such vendee to enter the military lines of the United States to pay said instalments as they became payable. (p. 358.)
2. Where said vendor during said war, and while said vendee continued to reside in said county of Madison and within the mili-

21	347
34	287
21	347
37	237
21	347
43	176
21	347
44	640

tary lines of the Confederate States, instituted his suit in chancery in the circuit court of Kanawha county, then a part of West Virginia, against said vendee to sell said land to pay said unpaid purchase-money, alleging in said bill that all of the defendants therein were non-residents of this State, and that they resided in the State of Virginia, east of the Blue Ridge; and where none of the defendants in said suit appeared thereto, or was served with process thereon, but the bill was taken for confessed against them upon an order of publication only, and where the land was sold under a decree in said cause, rendered upon said bill so taken for confessed, and was purchased by said vendor. **HELD:** That such decree is absolutely void; and in a suit brought by such vendee against said vendor, to enforce the specific execution of the contract for the sale of said land will be treated as a nullity. (p. 360.)

3. Where during the late civil war defendants who resided within the military lines of the Confederate States were sued in the courts of this State and within the military lines of the United States; and where such defendants were by the laws of the United States or the laws of this State, prohibited from appearing or remaining in this State, and thereby prevented from making defense to such suit, such prohibition will be treated as a denial of their right to make such defense, and equivalent to striking out their appearance and defense after the same had been in fact made. (p. 361.)
4. The said vendor having become the purchaser of said land under such decree, and subsequently conveyed the same to other parties, neither he nor they *thereby* acquired any valid title or claim to said land. (p. 364.)
5. The said vendee having purchased the said land for himself and also as trustee for other parties whose interest appears upon the face of the title-bond executed to him by said vendor, for the conveyance of the legal title thereto, such beneficiaries were necessary parties in any suit instituted by said vendor to sell the said land to satisfy said unpaid purchase-money; and not having been made parties to such suit, they are not bound by the decree rendered therein. (p. 366.)
6. The said vendor having purchased said land under the said decree, for a sum largely in excess of the amount therein decreed to him, and never having paid the same, as required by said decree, would, in case said decree be held valid, hold the same as trustee for the use of said beneficiaries, according to their several interests therein. (p. 367.)
7. In such a case, the said vendee and said beneficiaries, have the right to maintain an original bill against the said vendor, and his said alienees to enforce the specific execution of said contract, notwithstanding said decree. (p. 367.)

Appeal from a decree of the circuit court of the county of Kanawha rendered on the 5th day of December, 1881, in a cause in said court then pending, wherein A. G. Grinnan and others were plaintiffs, and W. H. Edwards and others were defendants, allowed upon the petition of said plaintiffs.

Hon. F. A. Guthrie, judge of the seventh judicial circuit, rendered the decree appealed from.

WOODS, JUDGE, furnishes the following statement of the case:

At the March rules 1875, the plaintiffs, Abigail H. Smith, Andrew G. Grinnan in his own right, and as trustee for Wm. K. Smith, F. B. Chewning and his wife Elizabeth Chewning sole heir of the said Wm. K. Smith then dead, filed their bill in the circuit court of Kanawha county against William H. Edwards and P. W. Morgan, administrator of the said William K. Smith, alleging in substance, that a tract of five thousand acres of land in Fayette county in this State, which had been conveyed in trust to John H. Platt, trustee, by deed dated the 7th day of October, 1857, to secure to the said Wm. H. Edwards the payment of eight thousand four hundred and seventeen dollars and twenty cents with interest thereon from the 1st day of October, 1858, due to him from said Wm. K. Smith, was with other lands conveyed by said Smith to the said A. G. Grinnan by deed dated the 29th day of October, 1857; that the said Grinnan by an article of agreement between himself and said Smith dated the 10th day of February, 1859, agreed to hold the said lands, conveyed to him by said deed of the 29th of October, 1857, which included said tract of five thousand acres, upon trust, *first*, to encumber the same to raise money to pay the expenses of selling the same; to sell the said lands or any part thereof, and out of the proceeds of such sales pay the amounts due or which may become due to said Grinnan from said Wm. K. Smith, or for which the said Grinnan may become liable as the surety of the said Smith, either before or after the said 10th day of February, 1859, including the sum of four hundred and thirty-eight dollars with interest from the 1st day of February, 1859, due to said Grinnan upon an open account, and seven hun-

dred and fifty-eight dollars with interest from the — day of October, 1857, due from said Smith to the said Grinnan as the guardian of Wm. H. Conway's children, together with the expenses incurred by him in selling or endeavoring to sell said lands, and also a remuneration for selling the same of at least five *per centum* on the amount of such sales. *Secondly*, to pay such debts of the said Wm. K. Smith, as he might in writing acknowledge to be just, excepting only one debt due to Dodge, Bacon & Co., and including a debt of twenty-five thousand dollars due to the said Abigail H. Smith, to be held by said Grinnan in trust for her separate use, subject to her disposal by will or order, and to pay her annually the interest thereon, and also to pay to the said F. B. Chewing the sum of at least one thousand dollars with power to said Grinnan to sell or exchange the said lands or any part thereof for other property or real estate, to be held upon the same trusts.

The bill also alleged, that by another agreement made between the said Wm. K. Smith, Abigail H. Smith and A. G. Grinnan, dated the 15th day of June, 1859, it was further agreed, that in consideration that the said Abigail H. Smith should relinquish her right of dower in said lands conveyed by said Wm. K. Smith to the said Grinnan by said deed dated October 29, 1857, the said Grinnan was to retain *one tenth* of the proceeds of the sales of all said lands in trust for said Abigail H. Smith as her separate estate; that the said John H. Platt, trustee as aforesaid, on the 19th of May, 1860, sold and conveyed the said five thousand acres under the provisions of said deed of trust to the said Wm. H. Edwards; that in pursuance of an agreement with the said Grinnan the said Edwards and his wife Catharine executed to the said Grinnan a title-bond dated the 15th day of October, 1860, in the penalty of twelve thousand dollars reciting that the said Edwards and wife had sold and agreed to convey to said Grinnan said tract of five thousand acres to be held by him as follows: one half thereof as trustee for Wm. K. Smith upon the same terms specified in said agreements dated the 10th of February, 1859, and the 15th of June, 1859, and the residue in his own right in the same manner, and to the same extent, as the same was held by him, on the 27th of

April, 1860, under and by virtue of said deeds of the 1st of October, 1857, and of the 29th October, 1857, except that it is not subject to said deed of trust to John H. Platt, trustee, dated October 7, 1857, and that the whole of said tract of five thousand acres was to be held by the said Grinnan upon trust to pay to the said Abigail H. Smith, *one tenth* of the net proceeds of the sale of said land; and reciting further that they had sold and agreed to convey said land for the price of nine thousand three hundred and ninety-eight dollars and thirty-one cents payable as follows: three thousand dollars cash in hand, and the residue in two equal installments in twelve and fifteen months thereafter with interest from the date thereof at seven *per centum per annum*, with the right reserved to the said Edwards to reclaim the said land upon certain conditions not necessary to be here stated.

The bill further alleges, that the date of said title-bond and for many years before the beginning of the war, and at the beginning thereof, during its continuance, and since the said war ended, the said A. G. Grinnan resided *east of the Blue Ridge*, in Madison county, Virginia, near to Orange Court House, and within what was then known as the Confederate States, and within the military lines of the Confederate States, and therefore upon the opposite side of the military lines from the said William H. Edwards and wife, who then resided in the county of Kanawha in Virginia; that the plaintiffs Abigail H. Smith, Wm. K. Smith, F. B. Chewning and his wife Elizabeth Chewning, who is the sole heir of said Wm. K. Smith, during the said war 1861-5, and before and since said war, resided in Spottsylvania county in Virginia, and within the Confederate States, and within the military lines thereof, and on the opposite side of the United States military lines from said county of Kanawha. Said bill further alleges that the said William H. Edwards on the 11th of December, 1863, instituted his chancery suit, and at the January rules 1864 filed his bill in the circuit court of Kanawha county, against said A. G. Grinnan, Wm. K. Smith and Abigail H. Smith alleging the execution of said title-bond dated October 15, 1860, the sale of said five thousand acres of land to have been made to the said A. G. Grinnan and Wm. K. Smith for the price and upon the payments

specified in said title-bond filed with said bill as exhibit "A," and averred the non-payment of the deferred installments, and that *all and each* of the said defendants, A. G. Grinnan, Wm. K. Smith and Abigail H. Smith were non-residents of West Virginia and resided in Virginia east of the Blue Ridge, and praying a sale of said lands to pay said deferred installments of purchase-money, and for general relief; that no process in said cause was served upon either of the said defendants therein, and they were proceeded against as non-residents of this State upon order of publication only, and upon said bills thereon, taken for confessed against them; that on the 14th of June, 1864, a decree was rendered in said cause against the said Grinnan *and* Wm. K. Smith, upon said bill so taken for confessed; that they pay to said Wm. H. Edwards the sum of six thousand three hundred and ninety-eight dollars and thirty-one cents, with lawful interest thereon from the 15th of October, 1860, and costs, and in case default in the payment thereof should be made for thirty days, a commissioner appointed by said decree was directed to sell the said five thousand acres of land; that the said land was so sold, and at said sale said Edwards became the purchaser thereof at the price of nine thousand dollars, which sale was reported and confirmed at the October term of said court 1864, and that said commissioner by deed dated December 14, 1864, conveyed the said land to said Wm. H. Edwards who since that date has been in possession, and taken the rents and profits of said land, which ought to extinguish the interest accruing on said six thousand three hundred and ninety-eight dollars and thirty-one cents from that date; that the plaintiffs on the 29th of December, 1869, tendered and asked leave to file their petition in said cause praying to be made defendants therein, to permit them to make defense thereto and to rehear said cause, which was rejected; that they took an appeal to the Court of Appeals from said decree of the 14th of December, 1864, which was dismissed; they further allege that they have always been ready, and are still ready to pay to the said Wm. H. Edwards whatever amount of said purchase-money may be justly due to him, and they pray that the said deed made by said commissioner to said Edwards may be canceled; that

said decree may be declared null and void; that the said Wm. H. Edwards may be compelled specifically to perform his contract set forth in said title-bond, and to convey to the said A. G. Grinnan the legal title to said land upon paying to him the balance of said purchase-money; that possession of said land be restored to them, and that he account for said rents and profits, and for general relief, and that if the court should deem it proper to do so, they pray that their said bill may be treated as a bill of review in said cause brought against them by said Edwards.

The plaintiffs on the 16th of May, 1877, by leave of the court, filed in this cause an amended bill against the same defendants, further alleging that they could not answer said bill and defend their interests in the said suit of *Edwards* against *Grinnan, &c.*, because they were disabled by the statute law of West Virginia, requiring them to take the suitor's test oath, which they could not conscientiously do; that the price of nine thousand dollars, which said Edwards purchased said land under his said decree, was nearly one thousand dollars in excess of the amount of his said decree including all costs and expense, for which he executed no obligation, and which he never paid, and which excess is due from him to the said plaintiffs; that the said Wm. H. Edwards, on the 21st of May, 1878, filed his answer to said bills, setting up various matters of defense, and alleging that he had conveyed said land to certain parties named by him, and suggested that they were necessary parties in the said suit, to which answer no replication was filed; and that subsequently a supplemental bill was filed against the same defendants, and certain other defendants to whom the said Wm. H. Edwards had conveyed said five thousand acres of land, after he purchased the same under his said decree, as alleged in his said answer and praying in said amended and supplemental bills for the same relief, as prayed for in said original bill, and for general relief.

The defendants appeared in court and demurred generally to the said original and amended bills, which demurrers were sustained and said bills dismissed with costs.

From this decree the said plaintiffs have obtained an appeal to this Court.

N. Fitzhugh and *S. A. Miller* for appellants cited the following authorities: 17 Wall. 438; 11 Wall. 581; 18 Wall. 106; 6 Wall. 533; *Freeman Judgments* § 121 and note; 4 Munf. 222; 1 Leigh 179; 1 Lead. Cas. Eq. (Part I.) 32; 2 Lead. Cas. Eq. (Part I.) 31.

Smith & Knight for appellees cited the following authorities: 10 Gratt. 284; 9 Gratt. 131; 5 W. Va. 111; 10 Leigh 507; Code ch. 134; *Id.* ch. 135; 3 Gratt. 98; 6 Gratt. 442; Acts 1872 ch. 69; 7 W. Va. 284; 18 Wall. 106; 11 Wall. 289; Code Va. (1860) ch. 171, § 19; 3 Gratt. 237; Story Eq. Pl. §§ 503 and note, 751; 3 Gratt. 134; *Freeman Judgments* §§ 29, 30; 3 Gratt. 148; 1 Leigh 108; 6 Leigh 208; 1 Rob. 28; 9 W. Va. 618; 8 Pet. 61; 7 Pet. 171.

WOODS, JUDGE, announced the opinion of the Court:

This cause was heard and determined in the court below, upon the demurrers to the plaintiffs' original and amended bills and therefore every allegation thereof upon consideration of said demurrers is taken to be true. It is therefore admitted, that the plaintiff, Andrew G. Grinnan, on the 15th of October, 1860, who at that time, and for many years prior thereto, resided in Madison county, Virginia, where he continued to reside during the continuance of the civil war, entered into a contract with the defendant, William H. Edwards, whereby he sold, and agreed to convey to the said Grinnan a tract of land in Fayette county, Virginia, containing five thousand acres, at the price of nine thousand three hundred and ninety-eight dollars and thirty-one cents, of which three thousand were in hand paid and the residue, was to be paid in two equal installments which respectively became payable on the 15th of October, 1861, and the 15th of January, 1862, bearing interest from the date of said purchase, at the rate of seven per centum per annum; that at the date of said purchase, the said Edwards and his wife, made and delivered to the said Grinnan, a title-bond, in the penalty of twelve thousand dollars with condition, upon the payment of said purchase-money to convey the said land to said Grinnan in trust, as follows: one half thereof as trustee for said William K. Smith, to be held upon the same terms as are

specified in said agreement dated the 10th of February, 1859, and the residue to his own use, in the same manner, and to the same extent as he held the same on the 27th of April, 1860, under said deeds from said Smith and wife, to said Grinnan dated respectively October 1, 1857, and October 29, 1857, and the *whole* of said tract to be held by said Grinnan upon trust to said Abigail H. Smith for one tenth of the net proceeds of the sale of the said land. It is further admitted, the said interest of said Wm. K. Smith, in the hands of said Grinnan was with other lands charged with the payment of twenty-five thousand dollars to said Abigail H. Smith, and ten thousand dollars to said plaintiff B. F. Chewning; and that before either of said installments became due the said war began, and that payment thereof was, for that cause not made, and could not lawfully be made.

The first questions arising on this state of facts are, what was the relation existing between said contracting parties, after the commencement, and during the continuance of the war; and what effect did the war have while it continued, upon the rights of the said parties under the said contract?

It is a well settled doctrine, among civilized nations in modern times that the law of nations is a part of the municipal law, and that the government of the United States, and of the several States composing the same, are bound by it, until the United States shall by act of Congress otherwise determine for itself.

By the proclamations of the President of the United States dated the 19th and the 27th of April, 1861, respectively, a blockade of the ports of South Carolina, North Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, Texas and Virginia was declared to exist, and the proclamation of Commodore Pendergast, dated the 30th day of April, 1861, announced to the world, that the blockade so declared was established. These proclamations, were the solemn, authorized declarations of the government of the United States in the exercise of its sovereign power, that a state of war existed between the said States, and the government of the United States, to continue until otherwise determined by Congress, or until resistance to the government of the United States within the said States shall cease.

A blockade, is the exercise of a belligerent right; before a blockade can be declared, a war must exist; and a blockade lawfully declared, is conclusive evidence that a state of war exists between the nation declaring such blockade, and the nation whose ports are blockaded.

That such a state of war existed between the government of the United States, and the several States named in the President's proclamations before referred to, and that said blockade was lawfully declared, and had become efficient, were questions fully considered and settled by the Supreme Court of the United States, in the "Prize Cases," reported in 2d Black's Repts. p. 635.

If any doubts had existed as to the actual existence of a state of war, at the date of said blockade, they were dispelled by the act of Congress passed on the 13th of July, 1861, and by the proclamation of the President of the United States, issued in pursuance thereof, on the 16th of August, 1861. By the 5th section of the said act of Congress it is, among other things enacted, that where such a state of facts, as is therein mentioned exists, "it may, and shall be lawful for the President, by proclamation to declare, that the inhabitants of such State, or any part or section thereof, where such insurrection exists are in a state of insurrection against the United States; and thereupon all commercial intercourse, by and between the same, and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful, so long as such condition of hostility shall continue; and all goods and chattels, wares and merchandise, coming from said State or section into the other parts of the United States, and all proceeding to such State or section, shall be forfeited to the United States." Acting under the authority of said 5th section of said act, the President of the United States issued his proclamation dated the 16th day of August, 1861, and thereby declared "that the inhabitants of the States of Georgia, North Carolina, South Carolina, Virginia, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida, except the inhabitants of that part of the State of Virginia lying west of the Allegheny mountains, and of certain other sections not necessary to be named, were in a state of insurrection against the United States, and

that all commercial intercourse between the same, and the inhabitants thereof (with the exceptions aforesaid) and the citizens of other States, and other parts of the United States, is unlawful, and will remain unlawful, until such insurrection shall cease, or has been repressed; and that all goods and chattels, wares, and merchandise, &c., coming from any of said States with the exceptions aforesaid, into other parts of the United States, without special license, &c., will be forfeited to the United States."

By said act of Congress, and said proclamation of the 16th of August, 1861, the legal status of the said plaintiffs and the defendant Wm. H. Edwards, from that date, until the termination of the civil war was determined. What was this legal status then existing between them? A war having been declared, or recognized to exist between two belligerents, whether it be a foreign or a civil war, what is its effect upon their citizens, or subjects? They thereby become enemies of each other. What then, is an enemy? By the law of nations, an enemy is defined to be, "one with whom a nation is at open war." "When the sovereign ruler of the State declares war against another sovereign, it is understood, the whole nation declares war against that other nation; all the subjects of one, are enemies to all the subjects of the other and during the existence of the war, they continue enemies in whatever country they may happen to be," and all persons residing within the territory occupied by the belligerents, although they in fact are foreigners, are liable to be treated as enemies. Vattel Law of Nations, book 3 ch. 5 sec. 69-71; Halleck's Int. Law, ch. 17 sec. 8; *White v. Burnley* 20 How. pp. 249-250, and 2 Black p. 636.

While the extreme right of war, authorizes the individuals of one party to kill and destroy the individuals of the other party, whenever milder means are insufficient to conquer them or to bring them to terms, yet this extreme right has been modified and limited by the usages and practices of modern warfare; but the right is universally conceded to each belligerent, to make prisoners of war of the subjects of the other, even though they may be non-combatants, if deemed necessary to its safety, or as a means of weakening the other. Halleck Int. L. ch. 22 sec. 1 and 2. Hence it

follows that no subject of one belligerent, without special license to do so, can enter the territory of the other without being liable to be apprehended, held, and treated as a prisoner of war.

Applying these well settled principles of the law of nations, to the facts in the case at bar, it will be apparent, that from and after the 16th of August, 1861, it was unlawful for said Grinnan, Wm. K. Smith and Abigail H. Smith to appear in any part of the State of Virginia lying west of the Allegheny mountains. They were by the law as effectually forbidden to do so, as if they alone, of all the people in Virginia, residing east of said range of mountains, had been, by special order of the commander-in-chief of the armies of the United States forbidden to do so. The attempt to do so would have been at the peril of their liberty; and all moneys and property found in their possession, would have been liable to have been forfeited to the United States. The war therefore rendered it impossible for said Grinnan to pay said purchase-money to the said Edwards, in that part of Virginia lying west of said mountains, or for said Edwards to go to receive the same, in that portion of Virginia lying east of said mountains. This condition of affairs cannot be said to have been the fault of either of them; it was the common misfortune of both, caused by the existence of the war, and by the accident of their residence, in hostile territory.

Another consequence of the war, equally embarrassing to said Grinnan and Edwards, arose from another well settled principle of the laws of nations, which declares, that a declaration, or recognition of war, effects an absolute interruption and interdiction of all commercial intercourse and dealings between the subjects of the two countries. The war puts an end at once, to all dealings and communications with each other; "all contracts made with the enemy during the war, are null and void; it prohibits the deposit of funds in the enemy's country, or the remission of funds to the subjects of the enemy, and this inhibition reaches to every communication direct or circuitous. The subjects of the belligerent States cannot commence or carry on correspondence or business together, and all co-partnerships existing between the subjects of the parties prior to the war, are dissolved by the

mere force and act of the war itself; though other contracts existing prior to the war, are not extinguished, but the remedy to enforce them is suspended, and this from the inability of an alien enemy to sue, or sustain, in the language of the civilians, a *persona standi in judicio*." Halleck's Int. L. chap. 17, sec. 9; 1st Kent Com. p. 66-68; *Hanger v. Abbott*, 6 Wall. p. 535. Justice Clifford pronouncing the opinion of the court in that case, quoting and approving the doctrine of Mr. Chitty, says "we suspend the right of the enemy, to the debts our traders owe, but we do not annul the right; with the return of peace, we return the right and remedy." During the war, all postal and other means of friendly intercourse between the countries of the belligerents cease; every effort is put forth by them, to prevent information of their internal, social, or political condition from reaching the other party; a practice enjoined and required by the necessities of self-preservation, and any violation of this rule by a subject of such belligerent is liable to incur the severest punishment. During the existence of the war, the courts of one belligerent are closed to the subjects of the other; he cannot sustain any contract in the tribunals of the other belligerents; the restoration of peace removes the disability, and opens the doors of the courts. Absolute suspension of the right, and prohibition to exercise it, exist during the war by the law of nations. Ability to sue, was the status of the creditor, when the contract was made; the effect of the war, is to suspend the right, under circumstances which make it his duty to abstain from any attempt to exercise it. "The suspension of the remedy during the war, is so absolute, that the courts of justice will not even grant a commission to take testimony in an enemy's country; but when the reason for the suspension ceases, the right to prosecute revives." *Hanger v. Abbott*, 6 Wall. p. 535-541. By the terms of the title-bond hereinbefore referred to, the plaintiff Grinnan bound himself to pay to the defendant Wm. H. Edwards, the last of said installments on the 15th of January, 1862, on which day the said Edwards by the same instrument bound himself, to convey said land to said Grinnan, on the payment of said last installment. The existence of the war made such payment unlawful, and therefore impossible. It also made it impossible and unlawful to

execute said conveyance, as acceptance by the grantee is necessary to a valid deed, which implies the presence of the grantee, or his agent appointed for that purpose after the war began in that portion of Virginia lying west of the Allegheny mountains, both of which were unlawful, and in effect prohibited. The right to a specific execution of said contract was mutual; the plaintiff Grinnan, holding said purchase-money in trust for said Edwards, and he in turn holding the legal title to said land in trust for said Grinnan, who in turn was to hold the same in trust for the said plaintiffs, as already stated.

We are therefore brought to the conclusion, that as the courts of Kanawha county, which was situated in that part of Virginia lying west of the Allegheny mountains, were closed against the said plaintiffs to enforce a specific execution of said contract in their behalf, the remedy of the said Edwards to enforce the specific execution of said contract on his behalf was suspended from and after the 16th day of August, 1861, during the continuance of the said war; and that during such period it became, and was unlawful for the plaintiffs to pay to the said Edwards the purchase-money due upon said land.

Upon said demurrer it is further admitted, that on the 11th day of December, 1863, during said war, while the said plaintiffs were prohibited from entering the said county of Kanawha, or any other portion of Virginia lying west of the Allegheny mountains, and thus excluded from the courts thereof, the said William H. Edwards brought his said suit in the circuit court of said county of Kanawha, against the plaintiffs Grinnan, Abigail H. Smith and the said Wm. K. Smith, all of whom then resided in that portion of Virginia lying east of said mountains, to enforce the specific execution of said contract, and without personal service of process upon any of said defendants therein, without any proceedings by attachment, but upon *order of publication only*, obtained a decree therein, for the sale of said land to satisfy said unpaid purchase-money; that the land was sold under said decree and was purchased by said Edwards at the price of nine thousand dollars, a sum in excess of the amount of his said decree of nearly one thousand dollars which he has never yet paid.

Upon this state of facts, the further questions arise, viz: what is the legal character of the decree thus obtained by said Edwards against the said plaintiffs; and what is its effect, if any, on their right now claimed by them, to enforce the specific execution of said contract?

It is unnecessary to discuss or consider here, whether the proceedings in said chancery suit are erroneous or not. If the said court had jurisdiction to render said decree, it is wholly immaterial what errors it may have committed therein; such decree cannot be assailed in any collateral proceedings on account of such errors. They can only be corrected by some appellate proceeding, in the manner, and within the period prescribed by law. While such proceedings may not be collaterally assailed, for errors therein, if it appear that the court had jurisdiction thereof, yet this Court may look into them to enable it to determine whether the proper parties thereto were before the court, and whether these plaintiffs have any rights resulting therefrom, or arising out of the same, in case it should be held that the court in rendering said decree had jurisdiction in the premises; and especially would this be proper to be done, when it is admitted, that after satisfying the amount of said decree in favor of said Edwards, a large surplus, arising from the sale of said land, still remains in his hands.

In every judicial proceeding, in order to obtain a valid and binding adjudication, there must be a plaintiff, a defendant and a judge. The plaintiff by bringing his suit, submits himself to the jurisdiction of the court; the defendant is cited or warned to appear and defend himself against the plaintiff's demand, if he can do so; he may be summoned in person; his appearance may be constrained by the seizure of his person or his property, or both. As a man's property is always presumed to be in his own possession or that of his lawful agent, a seizure thereof may be presumed to bring its owner with it, into court. Other forms of notice are sometimes, and for some purposes, held to be equivalent to personal service. An order of publication against defendants, duly executed, when authorized by law, is in many cases, held as equivalent to personal service. But in whatever manner the defendant may be cited to appear, in any judicial proceedings,

such summons, citation, or order of publication, necessarily implies, that the defendant so cited may appear in such court, in person, or by his counsel, and there remain, free to make his full defense to said proceeding, and that in doing so, he shall have the aid and protection afforded by the process of said court. It is well settled that "wherever a party may rightfully be sued, *there* he has the right to appear and make defense, for the liability and the right are inseparable. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." *Mc Veigh v. U. S.*, 11 Wall. 267; *Windsor v. Mc Veigh*, 3 Otto 274. In the last named case, Field, justice, delivering the opinion of the court, says, "that there must be a notice to the party of some kind, actual or constructive, to a valid judgment affecting his rights is admitted. Until such notice is given the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization over the subject matter. But notice, is only for the purpose of affording the party an opportunity of being heard upon the claim, or charges made; it is a summons to him to appear and speak, if anything he has to say, why the judgment sought, should not be rendered. A denial to a party of the benefit of a notice, would be to deny that he is entitled to notice at all. The law is, and it always has been, that whenever a citation or notice is required, the party cited, has the right to appear, and be heard, and when the latter is denied, the former is insufficient for any purpose. The denial to a party of the right to appear is in legal effect to recall the citation to him."

The same doctrine was held by the Supreme Court of the United States in *Dean v. Nelson*, 10 Wall. 172; *Lasere v. Rochereau*, 17 Wall. 437; and in *Ludlow v. Ramsey*, 11 Wall. 581. In *Dean v. Nelson*, the facts are substantially these: Dean owned two hundred and four shares of the capital stock in the Memphis Gaslight Company of the value of twenty thousand four hundred dollars. In May, 1861, he transferred this stock to Peppers, who in June, 1861, transferred the same to Nelson at its par value, and for the purchase-money therefor, took his notes, secured by two mortgages upon said

stock and other property, with the usual condition to be void upon payment of said notes, which notes and mortgages were transferred to Dean. In June, 1862, Nelson transferred one hundred and ninety-four shares of said stock to his wife, and the residue ten shares to one May. In April, 1863, said Nelson and wife by a military order, were driven south of the lines of the military forces of the United States, and forbidden to return. May was within the Confederate lines during all the war. During their enforced absence, Nelson on the 1st of September, 1863, brought his suit within the military district of Memphis, against said Nelson and wife and May to foreclose said mortgages. They were not served with personal notice in said suit, but an order of publication against them notifying them to appear was entered, and duly executed. No appearance was effected, the mortgages were foreclosed, the said stock was sold and purchased by Hanlin, who transferred the same to Dean. In June, 1865, Nelson, his wife, and May, filed their bill in the circuit court of the United States for the district of West Tennessee, against said Dean claiming the said stock, and praying that the same might be transferred to them. Dean claimed title to said stock under the said decree of foreclosure. Upon the hearing, the said circuit court decreed that Dean transfer to Mrs. Nelson one hundred and ninety-four shares, and to May the remaining ten shares of said stock. From this decree Dean obtained an appeal to the Supreme Court of the United States, which affirmed the said decree. Bradley, Justice, delivering the opinion of the court in that case, speaking of the order of publication therein, says: "A notice to said defendants Nelson, his wife and May published in a newspaper, was a mere idle form. They could not lawfully see it, or obey it. As to them the proceedings were wholly void and inoperative, and that the decree of foreclosure, so obtained against them left the equity of redemption in the mortgaged property unextinguished, and they therefore still had the right to redeem it."

The case of *Lasere v. Rochereau*, was in its main features similar to *Dean v. Nelson*. Lasere who resided in New Orleans, had executed two mortgages, on a house and lot situated therein. On the 15th of May, 1863, by a military order,

he was driven within the lines of the Confederate States, where he remained until April, 1865, when he returned to New Orleans. During his absence the mortgages were foreclosed, without personal service of process on Lasere, and his property was sold under said proceedings. Soon after his return he brought suit to vacate said proceedings of foreclosure, which terminated in a judgment against him. To this judgment Lasere obtained a writ of error to the supreme court of Louisiana, and thence to the Supreme Court of the United States which reversed said judgment. Swayne, Justice, delivering the opinion of the court in the last named case, says: "It is contrary to the plainest principles of reason and justice, that anyone should be condemned as to person or property without an opportunity to be heard. During his absence, he had no legal right to appoint an agent, or to transact any other business in New Orleans. Lasere doubtless knew nothing of the proceedings against him; and if he had had such knowledge, he was powerless to do anything to protect his rights. The case of *Dean v. Nelson*, which this Court has condemned, is substantially the one before us now."

We are therefore, upon principle and authority constrained to hold, that where a judicial proceeding has been instituted against any person affecting his life, liberty or property, and such person has been prohibited by competent authority, from appearing in said court, and making defense to such judicial proceeding, that a judgment or decree rendered therein against him, is *wholly inoperative and void*, and being *void* it is in legal effect, no judgment. "By it, no rights are divested, from it no rights can be obtained. Being worthless itself, all proceedings founded on it are equally worthless. It neither binds nor bars anyone. All acts performed, and all claims flowing out of it are void. A purchaser at a sale by its authority finds himself without title, and without redress. No resulting equity in the hands of third persons, and no power residing in any legislative, or other department of government, can invest it with any power or validity, and it may be assailed in any collateral proceeding." *Neal v. Utz*, 75 Va. 484; Freeman L. of Judts. sec. 117.

Applied to the case at bar, these principles operate with resistless force, against the claim of title made by the said

Edwards and his alienees, derived from the sale made under the authority of said decree, relied upon by them to resist the right of the said plaintiffs to have a specific execution of said contract. In the case at bar, the said plaintiffs at the making of said purchase on the 15th October, 1860, all resided in that part of Virginia lying east of the Allegheny mountains, and there they continued to reside during the whole period of the war. By the existence of the war, they and the said Edwards became legal enemies to each other, before said unpaid purchase-money became due. The plaintiffs lived in the territory of one belligerent, and the said Edwards, in the territory of the other; the plaintiffs dare not cross the military lines of the United States. They were, by the law of nations, as well as by the laws of Congress, and the proclamations of the President of the United States, expressly forbidden to do so, and all intercourse was prohibited, and therefore unlawful. When they were sued by said Edwards in the circuit court of Kanawha county, they were notified by order of publication and warned to appear and make defense; the laws of the United States prohibited them from doing so in person, and we have seen they could not appoint an attorney or agent to appear for them; it was unlawful for them to obey such order of publication, or even to see it; and to crown all, and make their disabilities absolutely insurmountable, the convention sitting at Wheeling to re-organize the State government of Virginia, by an ordinance passed the 19th of June, 1861, "To authorize the apprehending of suspicious persons in time of war," empowered the Governor to cause to be apprehended and secured, or to compel to depart the State, all suspicious persons of any foreign State or power at war with the United States; and thereby declared in effect, that all persons residing in Virginia, adhering to, and supporting the convention at Richmond or professing allegiance or obedience to the same, were "citizens of foreign States at war with the United States"—in fact were alien enemies—and were liable to be arrested on the warrant of the Governor, and either imprisoned or exiled. By an act of the General Assembly of the restored government of Virginia passed on the 4th of February, 1862, it was in substance enacted that during the existence of the war, it should be lawful for the

jailer of any county to receive into his jail and there safely keep "any person whatever, who might be delivered to him by the written order of the *Governor*, or of *any military officer* of the United States, without *warrant, precept or commitment*, until discharged under the laws of the United States, or by the Governor, or by the officer by whose order such persons were confined, or by an order from an officer of superior rank."

With all these disabilities imposed, and all these perils to life, liberty and property impending, it would have been folly and madness for the plaintiffs Grinnan, Abigail H. Smith, or said Wm. K. Smith to have attempted to appear, and defend their interests in the said suit brought against them by said Edwards, in the circuit court of Kanawha county.

We therefore hold, that the said disabilities and prohibitions, operating on said Grinnan, William K. Smith and his wife said Abigail H. Smith, effectually prevented them from appearing, and making their defense to the said suit brought against them in the circuit court of Kanawha county, and that the same will be treated as a denial of their right to appear and make such defense, and as equivalent to striking out their appearance and defense, after the same had in fact been made; and that therefore, the said decrees, rendered by the circuit court of Kanawha in favor of said Wm. H. Edwards, in his said suit against said Grinnan, Wm. K. Smith and Abigail H. Smith, and all proceedings under the same, are null and void, and that the same shall not in any wise impair the right of the plaintiffs to enforce the specific execution of said contract for the purchase of said five thousand acres of land.

As a result from the principles here established, it follows, that, when the said Edwards became the purchaser of said land at a sale thereof made under his said decree, and subsequently conveyed the same to said Sarah S. Tappan, Gilkerson, &c., neither he, nor they, acquired thereby any valid title or claim to said land.

But if we admit for the sake of the argument, that all of the proceedings in the said suit of *Edwards v. Grinnan, &c.*, were in all respects valid, yet the plaintiffs may maintain

their said bills against the said defendants for the whole, or at least part of the relief prayed for therein. The demurrers admit that when Grinnan purchased said land from Edwards on the 15th day of October, 1860, he in fact, purchased one half thereof for the use of said Wm. K. Smith in trust among other things, to secure to the plaintiff B. F. Chewning one thousand dollars. He, therefore possessed a large and valuable interest in said land at the time said Edwards brought his suit to sell the same; he was therefore a necessary party thereto (Story's Eq. Pls. sec 72) and not having been made a party in said suit, he is not bound by said decrees.

But it is further admitted by the demurrers, that said Edwards became the purchaser of said land under his decree at the price of nine thousand dollars, which was nearly one thousand dollars in excess of the amount of his decree, and this excess he has never paid, and that the same still remains in his hands for the benefit of the plaintiffs.

It cannot be denied that a trust having been created and charged on the said land, subject to the payment of said purchase-money, attaches with equal force to that portion of the proceeds of the sale thereof, which may remain after paying off said purchase-money, with the costs of any suit to enforce the payment thereof.

The plaintiffs may therefore in case said proceedings be held valid, maintain their said bills to reach the said trust-fund remaining in the hands of said Edwards, and have the same administered by the court of chancery according to their several interests therein.

We are of opinion that the decree of the circuit court of Kanawha county rendered on the 15th day of December, 1881, whereby it sustained the defendants' demurrers, to the plaintiffs' original, amended and supplemental bills, and dismissed the same, is erroneous, and must be reversed. It is therefore adjudged, ordered and decreed, that the said decree of the circuit court of Kanawha county of the 15th of December, 1881, be reversed and annulled; and this Court now proceeding to enter such decree, as the said circuit court ought to have entered upon said demurrers, it is further adjudged, ordered and decreed that the said demurrers be, and the same are hereby overruled, with leave to the defendants to

answer said bills ; and this cause is remanded to the circuit court of Kanawha county for further proceedings therein to be had, upon the principles hereinbefore laid down. And it is further adjudged, ordered and decreed, that the said appellees, other than the said administrator of Wm. K. Smith, deceased, do pay to the appellants their costs by them, about the prosecution of their appeal in this behalf expended.

THE OTHER JUDGES CONCURRED.

DECREE REVERSED.

WHEELING.

JOHN A. SHEPPARD, ADM'R v. PEABODY INS. CO.

Submitted August 3, 1882—Decided April 7, 1883.

(*WOODS, JUDGE, Absent.)

1. A demurrer to a declaration containing several counts should be overruled, if any one count is good. (p. 377.)
2. The common counts in an action of *assumpsit* are good on demurrer, when they are in the form prescribed by the English judges, set out in Conway Robinson's forms, pages 550, 551 and 554, though both the consideration and promises are stated after a *whereas*; but this mode of statement is in apparant violation of the general rule of pleading, that whatever facts are necessary to constitute the cause of action, should be stated directly and positively. (p. 378.)
3. The failure to file a bill of particulars in such an action is not ground for a demurrer. (p. 379.)
4. A policy of insurance against fire is a contract of indemnity ; and the assured must have an insurable interest in the property, when it is insured, and when the loss by fire occurs. (p. 379.)
5. But if the policy on its face sets out such an insurable interest, as for example ownership of the property insured, this alone establishes, that the assured has *prima facie* an insurable interest ; and if this be disputed, the insurance company must by proper proof show, that he had not an insurable interest. (p. 380.)

*Case submitted before Judge W. took his seat on the bench.

6. If a party has the care and custody of property, he may insure it in his own name, even though he be not responsible for its safety, if he really insured it for the owner, though this be not expressed on the face of the policy, for in such case, he has an insurable interest; and in general to give a party an insurable interest in property it is not necessary, that he should have any actual right of property either legal or equitable in the subject insured, but it is sufficient, if he or those whom he represents will suffer any sort of loss by its destruction. (p. 380.)
7. If the personal estate of a decedent be insufficient to pay all his debts, the administrator of such decedent has an insurable interest in the buildings, which belonged to his decedent; for our statute in such case authorizes him as administrator to bring a suit in chancery to have such buildings sold to pay the debts of the decedent. (p. 385.)
8. *Quære*: Would an administrator have such an insurable interest, if the personal estate was sufficient to pay all the decedent's debts? (p. 386.)
9. If the administrator of a decedent has such insurable interest, he has a right to recover on the policy in case of loss by fire, though when the loss occurs there are abundant real assets to pay all the decedent's debts, if they have not been actually paid. (p. 386.)
10. An insurance company, which establishes a local agency, is responsible for all the acts and declarations of its agent within the scope of his apparent authority. The question in such cases is not what authority he in fact has, but what were his apparent powers, that is, what powers had the assured a right to believe were given to the agent. (p. 381.)
11. A policy of insurance may be continued in force by a subsequent contract made before, at the time of, or after the policy had expired. (p. 387.)
12. Such a continuance of a policy differs from a new contract of insurance, as by it the original contract is kept up; and in case of loss the original policy is the basis of action in connection with the contract of renewal or continuance; and if changes are intended to be made, it is properly done by simply expressing the changes in the renewal or continuance-receipt (p. 382.)
13. If such receipt be ambiguous on its face, it may be explained by the situation of the parties or by the surrounding circumstances existing when it was executed, but not by verbal declaration of the parties. (p. 282.)
14. A denial by an insurance company of its liability on other grounds, before any preliminary proofs are made, and before the time within which such proofs are to be made by the terms

of the policy, is in law a waiver of the conditions of a policy requiring such proofs. (p. 383.)

16. If an instruction given by a court on an abstract question is erroneous, the Appellate Court will not reverse the judgment of the court below on that account, if it appears that no injury could have resulted to the plaintiff in error from such erroneous instruction; but if such erroneous instruction was calculated to mislead the jury to the injury of the plaintiff in error, the Appellate Court will reverse the judgment, and award a new trial on that account. (p. 394.)

Writ of error and *supersedeas* to a judgment of the circuit court of the county of Jefferson, rendered on the 15th day of November, 1879, in an action at law in said court then pending, wherein John A. Sheppard, administrator of Amos Sheppard deceased, was plaintiff, and The Peabody Insurance Company was defendant, allowed upon the petition of said company.

Hon. John Blair Hoge, judge of the third judicial circuit, rendered the judgment complained of.

GREEN, JUDGE, furnishes the following statement of case:

At the January rules, 1876, John A. Sheppard, administrator of Amos Sheppard, deceased, filed his declaration *assumpsit* in the circuit court of Jefferson county, against the Peabody Insurance Company at Wheeling, W. Va. Attached in his declaration were two counts, one a special count on a policy issued to him, by the said company, whereby it insured John A. Sheppard, administrator of Amos Sheppard, for one year from August 15, 1872, against loss by fire, for the amount of one thousand dollars on his barn in said county. The policy of assurance was set out at length in the declaration, and filed with it as a part thereof. It is unnecessary to state its provisions, but it will suffice to state, that there were in it all the usual provisions in such a policy, and its terms and conditions were as follows: "This insurance the risk not being changed, may be continued for such further time as shall be agreed upon, provided the premium therefor is paid and endorsed on this policy or a receipt therefor given for the same."

This first count in the declaration sets out, that ten dollars

which was the premium to be paid for this insurance for one year, was paid before this policy was issued and, that on the 1st of August, 1873, which was fifteen days before it expired, it was renewed for one year, from August 1, 1873, to August 15, 1874, the plaintiff paying the premium of ten dollars on the insurance for another year, and by agreement in writing, it was continued for this time; and this agreement is filed with the declaration signed by the president and secretary of the company, and countersigned by George E. Cordell, the agent of said company in Jefferson county. The count then proceeds. "And the said plaintiff further saith, that afterwards, to-wit, on the 3d day of September, 1874, in consideration of the payment of the sum of ten dollars by the plaintiff to the defendant, the said policy of insurance, by an agreement in writing duly subscribed in that behalf by one George E. Cordell, agent of the defendant at Charlestown in the county aforesaid, *the said policy of insurance* was continued from the day last named until the 3d day of September, 1875."

The declaration alleges, that this barn was afterwards, to-wit, on the 1st day of April, 1875, wholly destroyed by fire. There are other allegations in this first count not deemed necessary to be stated. The second count and the conclusion of the declaration are as follows: "And whereas, the said defendant, was on the 1st day of April, 1875, indebted to the plaintiff in the further sum of one thousand dollars for money had and received by the defendant, for the use of the plaintiff; and whereas, the defendant afterwards, to-wit, on the 1st day of April, 1875, in consideration of the promises respectively became liable and promised to pay the said several sums of money respectively to the plaintiff on request, yet the said defendant disregarding his said promise, has not paid any of said money or any part thereof to the plaintiff's damage two thousand dollars, and thereupon suit is brought."

This declaration was demurred to by the defendant, and the court overruled the demurrer, and the defendant pleaded *non-assumpsit* and issue was joined. This issue was tried by a jury, which being unable to agree were discharged, and afterwards it was again tried by another jury, which on

November 15, 1879, rendered a verdict for the plaintiff and assessed his damage at one thousand dollars; and thereupon the court rendered a judgment in favor of the plaintiff in accordance with this verdict, and the defendant moved the court to set aside this verdict and arrest the judgment in the case, which motion the court overruled, and the defendant took his bill of exceptions.

There was no ground for asking this new trial or for arresting the judgment, excepting only errors supposed to have been committed by the court, and to which exceptions were taken. These exceptions are as follows :

FIRST BILL OF EXCEPTIONS.

"Be it remembered that on the trial of this cause, the defendant, having given evidence to support the hypothesis embraced in his fourth instruction, prayed the court to grant the same, which was as follows :

"4th instruction.—'The court instructs the jury that by the terms of the policy filed as a part of the plaintiff's declaration, the insured in case of loss would only be entitled to recover according to his interest in the property insured; and that if they find from the evidence that the estate of Amos Sheppard, dec'd, proved to be solvent, and his debts have all been provided for by the sale of other assets, without the necessity of resorting to the alleged policy of insurance, then that his administrator, John A. Sheppard, has no insurable interest in said property, and cannot recover in this suit.'

But the court declined to give this instruction and the plaintiff excepted.

SECOND BILL OF EXCEPTIONS.

"Be it remembered that in this case the plaintiff, to support his case as set out in his declaration, testified that the following receipt was given by George E. Cordell, the general agent of the defendant, on the day of its date :

"'Rec'd of John A. Sheppard, adm'r, ten dollars, am't due on Peabody Insurance policy, commenced 3 day of September, 1874, till 3, 1875.

"'GEO. E. CORDELL, Agent,
" 'Charlestown, W. Va.'

“‘And the defendant gave evidence tending to show that the words ‘Peabody Insurance Company’ therein, were inserted by a clerical error for ‘Nail City Insurance Company,’ and that the plaintiff a few days afterwards had been given a policy in the Nail City Insurance Company by George E. Cordell, who was also agent of the last mentioned Company; and further to support his case, the plaintiff introduced in evidence a receipt as follows:

“‘CHARLESTOWN, WEST VA., Sept. 3, 1874.

“‘Received of John Amos Sheppard eleven dollars and twenty-five cents in full for insurance on barn in Peabody Ins. Co., Wheeling.

“‘GEO. E. CORDELLE, *Agent,*
“ *Charlestown, Va.*’

“‘The defendant having given evidence tending to show, that the latter receipt, since its execution, and whilst in the hands of the plaintiff, was altered with fraudulent intent, prayed the court to instruct the jury as follows:

“‘The court further instructs the jury that if they believe from the evidence that the plaintiff, John A. Sheppard, with fraudulent intent, altered the receipt for eleven dollars and twenty-five cents produced in evidence, then they are to deny him all benefit from the said receipt as evidence of a contract, or for any other purpose whatever.’

“‘Which instruction the court refused to grant in the form asked, but modified the same by striking out the words, ‘*Or any other purpose whatever*’ in the conclusion of said proposed instruction. To which refusal and modification the defendant excepted.”

THIRD BILL OF EXCEPTIONS.

“‘On the trial of this case, the defendant prayed the court to give the following instruction:

“‘The court instructs the jury that the burden of proof is on the plaintiff to make out his case by a preponderance of testimony, and that if they find the evidence evenly balanced, their verdict must be for the defendant,’ which the court refused, but granted the same as modified by the court so as to read as follows:

“The court instructs the jury that the burden of proof is on the plaintiff to make out his case by a preponderance of testimony, and that if they find the evidence evenly balanced, their verdict must be for defendant. In other words, the plaintiff's claim to recover in this action must be established by evidence which in the opinion of the jury outweighs the evidence produced by the defendant to resist the plaintiff's claim. If, therefore, in the opinion of the jury, the weight of evidence on each side is exactly equal, the plaintiff must fail in his recovery.”

“To which refusal and modification the defendant assented.”

FOURTH BILL OF EXCEPTIONS.

“On the trial of this case, the plaintiff having produced evidence the receipt No. 1, as set out in the defendant's second bill of exceptions, the defendant prayed the court to construe the same by granting the following instruction :

“That the receipt of the 3d day of September, 1874, which is for ten dollars, and has been exhibited to the jury, considered as a contract of insurance, could not renew a policy which had expired on the 15th of August, 1879;’ which the court declined; and thereupon the defendant excepted.”

FIFTH BILL OF EXCEPTIONS.

“On the trial of this case, the parties having produced evidence as set out in the defendant's preceding bills of exceptions, the defendant prayed the court to instruct the jury as follows :

“That in this action, if the plaintiff recover at all, he must recover upon a renewed policy of insurance in accordance with his declaration, and cannot recover upon a new policy as an original contract;’ but the court declined on the ground that the substance thereof was fully covered by a prior instruction of defendant which had been granted as follows :

“The court further instructs the jury that the plaintiff, having declared upon the renewal or continuation of a policy of insurance taken out by him in the defendant's company, which he sets out in his declaration, he cannot recover in this action upon an original and subsequent contract of insurance.”

made with the defendant, though they should believe such original and subsequent contract to have been made.'

"To which refusal of the court the defendant excepted."

SIXTH BILL OF EXCEPTIONS.

"On the trial of this cause, the parties having produced evidence as set out in the foregoing bills of exceptions, and the plaintiff having testified that on the 3d of September, 1874, he applied to George E. Cordell, the general agent of the Peabody Ins. Co., for a renewal of his policy, as set out in the declaration, and that the said Cordell received the premium therefor but afterwards delivered to the plaintiff a different policy in another company of which he was also the agent. Thereupon the court gave the following instruction:

"If the jury shall believe from the evidence that George E. Cordell was the general agent of the Peabody Insurance Company, and that the plaintiff applied to him for a continuance, reinstatement or renewal of the policy filed with the declaration, and that the said agent received the premium therefor but afterwards delivered to the plaintiff a different policy in another company, whether such delivery was made by mistake or intentionally, then the defendant is bound by the act of its agent in receiving the said premium as the consideration of such renewal as if one of its own policies had been delivered to the plaintiff by the said agent.'

"To which the defendant excepted."

SEVENTH BILL OF EXCEPTIONS.

"On the trial of this case, the parties having produced evidence as set out in the foregoing bills of exceptions, and the evidence being concluded, the court, at the instance of the plaintiff, gave the following instructions:

"PLAINTIFF'S INSTRUCTION NO. 1.

"If the jury believe from the evidence that the receipt for ten dollars, submitted to them in evidence was executed by Geo. E. Cordell and delivered to the plaintiff, that the said Cordell was, at the time the said receipt was so given, the agent of the defendant to transact the business of insurance for it, and as such receipted for premiums known as renewal premiums, and shall further believe from the evidence that

the said receipt was given to renew the policy in the declaration mentioned, they will find for plaintiff whatever amount of loss within the limits of the amount named in the policy they shall find from the evidence was sustained by him by fire between the date of the said receipt and the 3d day of September, 1875.'

"PLAINTIFF'S INSTRUCTION NO. 2.

"'If the jury believe from the evidence that the defendant was notified of the loss accruing to the plaintiff under the policy filed in this cause, and that the said policy was renewed or continued by the said defendant so as to be a subsisting policy at the time the said loss occurred, the plaintiff is entitled to recover whatever loss it may prove covered by the policy and within the limits of the sum mentioned therein, even although they shall believe that the proofs of the said loss required by the conditions of the said policy were not made, *provided* they shall further believe from the evidence that within the time mentioned in the said policy for the said proofs, the defendant declined to pay the said loss on other grounds than the failure of the plaintiff to furnish the said proofs.'

"PLAINTIFF'S INSTRUCTION NO. 3.

"'If the jury believe from the evidence, that the policy in the declaration set forth, was by renewal or continuance a subsisting policy at the time the loss complained of by the plaintiff occurred, and that the defendant knew that the plaintiff was interested in the property insured only as administrator of Amos Sheppard, the contract of insurance thus evidenced is obligatory on the defendant to the extent of the loss of the property covered by it and proved within the limits of the amount mentioned in said contract.'

"PLAINTIFF'S INSTRUCTION NO. 4.

"'If the jury believe from the evidence that a contract for the insurance of the plaintiff's barn, insured by him as administrator, was made by him with George E. Cordell, with reference to and for the purpose of reinstating or renewing the policy with the declaration filed, so that said policy was continued until after the loss complained of occurred, and shall further believe from the evidence that the said Cordell was

the general agent of the Peabody Insurance Company to transact the general business for it, then the plaintiff is entitled to recover whatever loss, within the sum covered by the policy, the jury shall believe from the evidence has accrued to the plaintiff, unless they further believe from the evidence that the general powers of the said agent were so restrained by the company as to prohibit the said agent from making the contract herein first mentioned, and that the plaintiff had notice of the said prohibition.'

"To the granting of which the defendant excepted, and the defendants have obtained an appeal and *supersedeas* to the judgment rendered on November 15, 1879."

R. G. Barr for plaintiff in error cited the following authorities: 10 W. Va. 507; 8 W. Va. 444; 6 Harr. & J. 408; Code, ch. 125 § 11; 8 Gratt. 1; 10 W. Va. 470; 8 W. Va. 218; Fland. (Fire Ins.) 348; 27 N. Y. 163; 9 Bosw. 404; 45 N. Y. 454; 8 Abb. Pr. (N. Y.) 261.

William H. Travers and *Grovè & Brown* for defendant in error cited the following authorities: Code, ch. 125 §§ 9, 29; 6 Gratt. 130; 3 Rob. (New) Prac. 553; 28 Gratt. 389; 24 N. Y. 302; Wood Fire Ins. 299; 10 W. Va. 524; 1 Saund. 55; 4 Min. Inst. part II. p. 1006; 16 Gratt. 313; 8 W. Va. 474; 10 W. Va. 507; 3 Leigh 250; 12 Serg. & R. 131; 1 Penn. 386; 26 Gratt. 854; *Id.* 874; May Ins. 573, 574; Acts 1871-2 ch. 79 § 1; Code, ch. 36 § 44.

GREEN, JUDGE, announced the opinion of the Court:

The first enquiry is, did the court below err in overruling the demurrer to the declaration? As the demurrer was to the entire declaration and not to each count, if either count was sufficient, the court did not err. See *Nutter v. Sydenstricker*, 11 W. Va. 535, syllabus 2 and 543 and cases cited. The second or common count for money had and received, is good in this case. It is objected to because both the consideration for the promise and the promise itself, is stated after a *whereas*. It is unquestionably true, that it is a general rule of pleading, that whatever facts are necessary to constitute the cause of action should be directly and positively stated in the declaration, and not by way of recital; but though this

rule be apparently violated, it has been expressly decided by the Court, that if in *assumpsit* in this common indebitur count the promise is stated after a *whereas*, though the promise is the very gist of the action, yet such a count so framed will be held good on demurrer. See *Barton & Co. v. Handsford*, 10 W. Va. 470.

This conclusion was reached because this was the manner in which the judges of England had prescribed for such a count in an action of *assumpsit*; and they decided, that such a mode of stating the promise in such a count was good independently of their having prescribed this as its proper form. And while the Virginia courts had repeatedly sustained demurrers in other forms of action, because necessary facts were not stated in the declarations positively, but by way of a recital as after a *whereas*, yet they had never held that a demurrer to a count in a declaration in *indebitur assumpsit* would be defective, because the promise was stated after a *whereas*, and there was supposed to be a difference between such a case and other kinds of suits, when statements of necessary facts were made after a *whereas*. We therefore held, that we would not go any further than the Virginia courts had gone, in enforcing this general rule of pleading that all necessary facts should be stated in the declarations positively, and not after a *whereas* or by way of recital.

It is true, that we did not in the case of *Barton & Co. v. Handsford* decide, that in a common count in a declaration of *assumpsit*, the consideration might be stated after a *whereas*, but only, that the promise might be so stated. But as the promise is the very gist of the action of *assumpsit*, it would seem to follow, that if we permit it to be thus stated after a *whereas*, we could not consistently hold, that in such a case the consideration could not be stated after a *whereas*, especially when the forms of common counts, as prescribed by the English judges, not only stated the promise after a *whereas*, but also the consideration. See *Conway Robinson* Forms, pages 550, 551 and 554.

In this case, the second or common count follows the form substantially so prescribed by the English judges, and we think must be held good on demurrer. The circuit court therefore, did not err in overruling the demurrer to the

laration. It is true, it is urged, that this common count was fatally defective, because no bill of particulars was filed with the declaration. But this Court has expressly decided, what would seem to me to be obvious enough before our decision, that the failure to file a bill of particulars or its being too vague when filed, was no ground of demurrer. See *Abell v. Penn. Mutual Life Ins. Co.*, 18 W. Va. p. 400, 412, 413, and *Choch v. Guthrie*, 15 W. Va. 113, 114.

The next enquiry is, did the court err in giving any instruction to the jury excepted to by the defendant, or in refusing to give any instructions offered by him, or in improperly modifying those given? Before considering these instructions given and refused by the circuit court, I will consider some general principles of law applicable to the questions, which were presented during the trial of this case in the court below.

It may be regarded as well settled, that a policy of insurance against fire, is a contract of indemnity against loss by fire, and that the assured must have an interest in the property insured. See *Quarrier, Trustee, v. Insurance Co.*, 10 W. Va. p. 522 and authorities there cited. This interest must be existing, as a general rule, both when the policy is issued and when the loss occurred. But it would be a great error to assume, that by an insurable interest is meant *property* in the subject insured. The assured has in his property insured an insurable interest; whenever he holds such a relation to it, that its destruction by fire would involve him in pecuniary loss or would involve others in pecuniary loss, for whom he acts or whom he represents. As for instance, a common carrier has an insurable interest in the goods carried by him, which he may insure to their full value, without regard to his liability to the owner of the goods. *Crowley v. Cohen*, 3 B. & Ad. 478; *London & Northwestern Railway Co. v. Glyn*, 1 El. & El. 652. So has a warehousemen, though he is liable only for his own negligence to the owner. *Waters v. Monarch Assurance Co.*, 5 El. & Bl. 870. And to give a party an insurable interest in property, it is not necessary that he should have any pecuniary interest therein, or that he should be even responsible for its safekeeping. If he has the care or possession of the property, he may insure in his own

name for the benefit of others, the owners, and the insurance will inure to their benefit upon their subsequent assent to the insurance, even when this assent is after the loss has occurred. *Waring v. Indemnity Insurance Co.*, 45 N. Y. 606. (6 Am. Rep. 146).

As I understand it, wherever an insurable interest exists in an agent, he may as a general rule, insure for the entire value and recover the same for the benefit of the owners, over and above his own interest, whenever the assurance was effected for that purpose, though the agent was not responsible to the owners, and they were not aware of any insurance for their benefit. *Waters v. Monarch Insurance Co.*, 5 El. & Bl. 870. And policies in such cases, may be issued "for the benefit of whom it may concern," and then any person, who has an insurable interest therein at the time of the loss, *and whose interest was intended to be covered by the policy*, may recover thereon.

It is obvious, that the main object of the law in requiring the insured to have what is called an insurable interest in the property insured, is to discourage and prevent parties having no control or management of property, and no sort of interest in its preservation from fire but mere strangers to the property, obtaining policies on such property against its destruction by fire. Such policies would amount to nothing but wagers, whether the property should be destroyed by fire in a specified time. And public policy, rather than justice to the insurance company requires, that the law should pronounce, as it does, such policies void.

Every policy of insurance against loss by fire, on its face, professes to show, that the insured has an insurable interest in the property; and in any controversy between the insured and the company, this policy on its face, is sufficient *prima facie* evidence, that the insured has an insurable interest in the property; and if the company seeks to avoid its contract by claiming, that it was but a wager, contrary to public policy, the burden of overcoming the *prima facie* evidence to the contrary, on the face of the policy, is upon the company, which it must meet by proving, that in fact the insured had no insurable interest in the property.

It is true, that the declaration must allege such insurable

interest in a general way, but this is proven *prima facie* by the mere production of the policy. And if the company relies on the fact, that the insured really had no insurable interest, it must establish its defense by proper proof. See *Nichols et al. v. Fayette Ins. Co.*, 1 Allen (Mass.) 63; *Fowler v. N. Y. Ins. Co.* 23 Barb. (N. Y.) 143; *Franklin v. National Ins. Co.* 43 Mo. 491.

With reference to the authority possessed by the agent of a fire insurance company to do certain acts, it is true that the reports of judicial decisions are filled with the efforts of insurance companies, by their counsel, to establish the doctrine, that they can through parties in their employ make all the efforts, which they actually do ordinarily make to get persons to insure in their companies; and yet, after having done so, limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy; the argument being, that as to all other acts of the agent, he is the agent of the assured. And as stated in *Insurance Company v. Wilkinson*, 13 Wall. 255, "This proposition is not without support in some of the earlier decisions on the subject. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are *prima facie* co-extensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals." *Beebe v. Hartford Ins. Co.*, 25 Conn. 51; *Lycoming Ins. Co. v. Schollenberger*, 8 Wright 259; *Beal v. The Park Ins. Co.*, 16 Wis. 257; *Davenport v. Peoria Ins. Co.*, 17 Iowa 276.

An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal. *Savings Bank v. Charter Oak Ins. Co.*, 31 Conn. 517; *Horwitz v. Equitable Ins. Co.*, 40 Mo. 557; *Ayres v. Hartford Ins. Co.*, 17 Iowa 176; *Howard Ins. Co. v. Bruner*, 11 Harris 50." And the decisions sustain the position, that the company is bound by all the acts of its agents within the scope of his *apparent* authority, unless notice is given the assured, that with reference to matters within the scope of his apparent authority certain limitations are imposed upon

the agent. The question is, not what the powers of the agent in fact were, but what were his apparent powers, that is what had the assured a right to believe were given to the agent. *Columbia Ins. Co. v. Cooper*, 50 Pa. St. 331; *Insurance Co. v. Wilkinson*, 13 Wall. (U. S.) 222; *Eclectic Life Ins. Co. v. Fahrenkrug*, 68 Ill. 463; *Ætna Ins. Co. v. Maguire*, 51 Ill. 351; *Washington Fire Ins. Co. v. Davison*, 30 Md. 104; *Franklin Fire Ins. Co. v. Murray*, 73 Pa. St. 28; *Dayton Ins. Co. v. Kelly*, 24 Ohio St. 345-366.

When a policy of insurance is renewed or continued in force by a subsequent contract, it differs from a new contract of insurance, for by it the original contract is kept up, and in case of loss the original policy is the basis of the action, in connection with the contract of renewal or continuance. If changes in any of the terms, or any other change is intended to be made at the time of such renewal or continuance of a policy, it can be properly done without changing the wording of the original policy, by simply expressing the change agreed on in the renewal receipt. But the change should be expressed in the receipt, and the original policy with all its terms remains in force after such renewal or continuance, changed only in those respects which are stated in the receipt. For this receipt is not only a receipt, but is also a contract, while so far as it operates as a receipt, parol evidence may be introduced to vary it, but so far as it operates as a contract being in writing, it cannot be changed or modified by parol proof. *State, etc., Ins. Co. v. Porter*, 3 Grant's Cases (Pa.) 123; *Witherel v. Maine Ins. Co.*, 49 Me. 200, 203, 204; *Lacey v. Phenix F. Ins. Co.*, 56 Me. 562, 565; *New England Ins. Co. v. Wetmore*, 32 Ill. 221, 242, 243; *Driggs v. Albany Ins. Co.*, 10 Barb. (N. Y.) 440, 445.

Although such a renewal or continuance receipt, so far as it operates as a contract, cannot be explained or contradicted by any parol evidence yet, if it is on its face ambiguous, the meaning of the parties may be shown by proving the situation of the parties to the contract, the circumstances surrounding them when the renewal receipt was given, and their subsequent conduct in carrying into effect their written contract. For this kind of parol evidence, though not the verbal declarations of parties, can always be received to explain the

meaning of parties, whenever any written contract is ambiguous on its face. See *Crislip, Guardian, v. Cain*, 19 W. Va. syl. 12 and 13 pp. 440 and 441, and the numerous authorities cited to sustain this proposition on page 484.

Generally a refusal by the company to pay, or a denial of its liability before any preliminary proofs are made, as required on the face of a policy, whereby the assured is induced not to comply with the conditions of the policy in that respect, is in law a waiver of the conditions of the policy requiring such proofs to be made. Such a denial of responsibility is the same as a notice to the assured, that payment will not be made in any event, upon grounds other than a failure to comply by the assured with the conditions as to the proof of loss; and it thus renders them wholly unnecessary, as the law does not require a person to perform an act, which the act of the other party has rendered unnecessary or a mere idle formality. *Norwich, &c., Trans. Co. v. Western Mass. Ins. Co.*, 34 Conn. 561; *Taylor v. Merchants' Ins. Co.*, 9 How. (U. S.) 390; *Post v. Aetna Ins. Co.*, 43 Barb. (N. Y.) 351; *Dean v. Aetna Life Ins. Co.*, 4 Thompson and Cook (N. Y.) 497.

We will now apply these principles to the case before us. It appears from the first bill of exceptions that the defendant asked the court to instruct the jury: "If from the evidence the jury find that the estate of Amos Sheppard prove to be solvent, and his debts have all been provided for by the sale of other assets, without the necessity of resorting to the alleged policy of insurance then, that the administrator of John A. Sheppard has no insurable interest in said property, and can not recover in this suit." The court refused to give this instruction. Did it err in so doing? This instruction is very badly worded, but I understand that it propounds as law the proposition, that if an administrator insures real estate of his decedent then, he has no insurable interest if the estate both real and personal is solvent, whether the debts have been actually paid or not, provided, that by the sale of other real estate a fund has been raised, which will be sufficient to pay the debts of the decedent.

It is true, that notwithstanding our statute subjecting realty to the payment of debts of the decedent, the real estate of a decedent in no wise and for no purpose goes into the

possession or control of the administrator, but the legal title to the same descends directly to the legal heirs, subject in course to the just debts of the intestate, in so far at least as the personalty falls short of paying the same. See *Sardine v. Kline's Adm'r*, 8 W. Va. syl. 3, p. 218. But our Code provides: "When the personal estate of a decedent is insufficient for the payment of his debts, his administrator may commence and prosecute a suit in equity, to subject his real estate to the payment of his debts." See Code of W. Va. ch. 86, § 7.

The administrator therefore, when the personal estate of the decedent in his hands is insufficient to pay his debts, is not a mere intermeddler when he insures the real estate; such insurance is not a mere wager, as to whether the property insured will be burned in a specified time. It is therefore not clear, that an administrator would not under the circumstances at least, and on the principles we have laid down, have a right to insure a house which had belonged to his decedent for the benefit of creditors. That the creditors themselves of the decedent would under these circumstances have an insurable interest, seems clear. The law does not require, that the assured should have an estate or property in the subject of insurance. It is sufficient, that he has a direct pecuniary interest in its preservation. If the assured be liable to loss, if the property be destroyed by fire, he has always an insurable interest. Creditors having under the circumstances we have supposed, no other way of making good their debts, and having a direct and certain right to subject the real estate to sale for their benefit, have an interest in it positive and absolute as one having a specific lien, or even the owner himself. It is not at all in the nature of expectation, such as a presumptive heir has in the estate of his ancestor. The creditors therefore would have a clear right to insure, but their recovery would have been limited to the amount of their debts.

With reference to the administrator, he would have a clear right to insure the personal property of the decedent in his hands; he would have the legal title to such property. It is quite different with the land, which descends to the heirs. And if he had a right to insure the barn in this

it results from his power derived from the statute, to institute a suit and have it sold; the proceeds to be applied to the payment of the debts of his intestate. That it is highly convenient that he should possess this power, is obvious; as he would know far better and sooner than creditors, when a necessity to insure it arose from the insufficiency of the personal estate to pay the debts, and he could act more promptly and efficiently than creditors scattered and incapable of acting in concert.

Under our statute, an administrator has a certain connection with the real property. That he has no estate in it is true, but this we have seen, is not necessary to an insurable interest. He has no power to sell, but if the personal estate be insufficient, he may apply to the court for an order to sell the real estate. It is material to the value of this power and to the objects contemplated by our statute, that the real estate should be protected from injury in the interim; and until the proceedings can be perfected. If the administrator cannot insure the parties interested, the creditors will be practically excluded from a remedy, which all other persons having a similar interest possess. There are many cases, as we have seen, where an agent or trustee may insure the interest of the party beneficially interested. And I therefore conclude, that at least, when the personal estate is insufficient to pay the debts, the administrator would have a right to insure a building on the real estate of the decedent. He has under these circumstances, at least, an insurable interest.

This reasoning is deduced from the language of Chief Justice Denio, in *Herkimer v. Rice*, 27 N. Y. pp. 169 to 180, and I have used his identical language, so far as it required no modification to suit the case before us. He adds on page 180: "It is not necessary to decide to whom the surplus of the insurance money would have belonged, if the fund had exceeded the amount of the debts. The effect of the judgment in *Wyman v. Wyman* would probably, be that such surplus belonged to the heirs as a substitute for the real estate, so far as indemnity was not needed for the payment of the debts; it was a trust for the heirs. It is true the administrator was not a representative of the heirs; but the company agreed to insure a certain amount on the buildings, and after the loss

they voluntarily paid it. So far as it was not needed for the payment of debts it was a trust for some parties."

This decision in *Herkimer v. Rice*, 27 N. Y. 163, is sustained in *Phelps v. Gebhard*, 9 Bosw. 404, and *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; and in *Beach v. Bowery Ins. Co.*, 8 Abb. Pr. (N. Y.) 261, which I have not been able to see, it is made a query, whether the administrator has not an insurable interest when the personalty is sufficient to pay all the debts. But as in this case, the record does not show, that any evidence was offered tending to prove, that the personal estate was sufficient to pay all the intestate's debts, this query need not be answered in this case.

If all the debts of the intestate had not been actually paid, when this suit was instituted by the administrator, on this policy, he would not be debarred from recovering because there were or might be real assets, of which the debts might be paid, any more than a judgment-creditor, who had insured the house of his debtor could be debarred from recovering on the policy, if the house was burned, if his debt remained unpaid; because there might still be real estate of his debtor, out of which he might make his debt. Having an insurable interest in the property, he would have a right to enforce the payment of the loss by fire, that it might be applied to the payment of his debt; and the insurance company has no right, legal or equitable, to require him to seek the payment of his debt elsewhere. If it had been actually paid, he could not recover on the policy, as he would have no continuing insurable interest. In the case supposed in this fourth instruction, set out in the first bill of exceptions, the court properly refused to say, that the plaintiff could not recover in this suit.

The circuit court committed no error in the modification of the instruction, set out in second bill of exceptions. The instruction asked was: "The court further instructs the jury, that if they believe from the evidence, that the plaintiff, John A. Sheppard, with fraudulent intent, altered the receipt for eleven dollars and twenty-five cents, produced in evidence, then they are to deny him all benefit from the said receipt as evidence of a contract, or for any other purpose whatever." The court struck out the words, "or for any other purpose whatever," and then granted this instruction. As the record en-

tirely fails to show, in what manner this receipt was altered, whether in its date, the amount received or in the name of the company, in which the insurances on which this payment was made by John A. Sheppard, administrator of Amos Sheppard, it is impossible for us to say whether this altered receipt, if the alteration was made fraudulently, could not properly be used for some purpose, though it is clear, that it could not be used as evidence of the contract referred to in the declaration. As we do not know for what other purpose it could have been used, or even the form of this receipt as it was before its alteration, we cannot say, that the court erred in striking out these words, "or for any other purpose," from this instruction. It is incumbent on the exceptor to show affirmatively, that the circuit court erred to his prejudice, and this he has failed to do in this case, and has presented his objection to this action of the court in so obscure a manner as to render it impossible for us to say, that the court erred to his injury in striking out these words.

There was no error in the matter set out in the third bill of exceptions. I can see no difference in the instruction asked and the instruction given, though perhaps the instruction given by the court throughout was couched in language, which probably the jury would better understand.

The fourth bill of exceptions is, that the court refused to grant to the defendant this instruction: "That the receipt dated the 3d day of September, 1874, which is for ten dollars, and which has been exhibited to the jury, considered as a contract of insurance could not renew a policy, which had expired on the 15th of August, 1874." This instruction is based on the assumption, that the policy could not as a legal proposition be continued in force from September 3, 1874, to September 5, 1875, for the reason, that it had expired some two or three weeks before the date of this receipt. Or if it could be so continued by an express agreement in writing, it was not capable of being so continued by this receipt of September 5, 1874.

I am unable to see any reason, why the company could not by a proper agreement or receipt agree to continue in force upon the same terms and conditions and for the same amount the policy, which had ceased to exist on August 15

preceding, for another year from September 3, 1874. If an agreement would operate precisely as it would have had it been entered into on August 15, 1874, except that the insurance would extend for one year from September 3, 1874, instead of for one year from August 15, 1874, can you imagine no reason, why parties competent to make a contract could not do it in this form, as readily as a landlord might some time after the expiration of a lease agree with his tenant that he should occupy the leased premises another year from the date of the agreement on the same terms on which he had occupied them for the previous year?

There is nothing in the insurance business, that requires any particular form to be used in making their contracts of insurance in order, that they may be binding. It may as well be done by a receipt or paper referring to a policy which had expired as containing the terms of the agreement as in any other form. But this instruction asks the court to declare, that it could not be done by the receipt for ten dollars given September 3, 1874. Assuming for the present that George E. Cordell, the agent of the defendant at Charleston, had authority to make such contract, we will now consider whether the court could have properly instructed the jury on a matter of law, that he could not do so when he executed this receipt on September 3, 1874. The receipt is as follows:

"\$10.00. Received of John A. Sheppard, administrator, ten dollars amount due on Peabody insurance policy commenced September 3, 1874, till September 3, 1875.

"GEORGE E. CORDELL,

"Agent Charlestown, W. Va.

There can be no question but that this paper is ambiguous in meaning. But when the court considered, that it was shewn in evidence as a continuation of a certain policy filed with the declaration, and which had once before been continued in force for a year, after it had originally expired, and which policy and continuance were before it, they being then filed with the declaration, could it say, that this receipt was incapable of such an interpretation or, that it could not be interpreted as continuing this policy in force for another year from September 3, 1874, as it was asked to do by the instruction? It seems to me that it could not. As this

ceipt was ambiguous, the court in construing its meaning or the jury, if they acted upon it, would as we have seen, in order to ascertain its meaning, have had a right to look to the situation of the parties and the circumstances surrounding them, when this receipt was executed on September 3, 1874.

Looking then only at the written papers before the court, to ascertain this situation and circumstances, we find, that policy No. 3121 had been issued by the Peabody Insurance Company to John A. Sheppard, administrator of Amos Sheppard, on August 15, 1872; that the annual premium for the insurance for a year in this policy named was ten dollars, corresponding exactly with the amount of this receipt; that it was issued by the company named in this receipt; and that it was signed by the same agent of this company. On examining this policy we find, that the tenth section of it provided that "this insurance may be continued for such further time as shall be agreed on, provided the premium therefor is paid and endorsed on the policy, or a receipt given for the same." And we further find from a paper filed with the declaration at the end of the year this policy was renewed for another year by such a formal receipt for ten dollars; the time of its extension being for one year from August 15, 1873. This year expired on August 15, 1874, and in less than twenty days thereafter this receipt of September 3, 1874, was executed, corresponding in amount with the former receipt also signed by George E. Cordell, agent, and stating, that it was the amount due on Peabody insurance policy; referring it would seem to this policy. Now aided by these circumstances, to which we have a right to look, was it not the true meaning of this last receipt for ten dollars, that amount being the exact premium on this policy for a year, to continue it in force for another year as had been previously done; and do not the words "commenced 3d day of September, 1874, till September 3, 1875," mean, that the time of this extension and continuance of this policy commenced on the 3d day of September, 1874, and continued till September 3, 1875? It seems to me, that this ambiguous paper, when interpreted by the situation of the parties and the surrounding circumstances as it should be, meant exactly this and nothing more or less; and

therefore the court properly refused to instruct the jury, that this was not its meaning and that it could not so operate.

The court did not err in the matters set out in the fifth bill of exceptions. The instruction set out in it, which the court had already given the jury, was the same in substance, which the defendant asked should be again given to the jury, and the court properly refused to do so, as this repetition of an instruction in varying language could do no good, and might tend to confuse the jury.

There were four instructions given by the court to the jury, at the instance of the plaintiff, and they are set out in defendant's bill of exception No. 7. The first of these instructions was in substance that: "If the jury find from the evidence, that the said receipt of ten dollars was given to renew the policy in the declaration mentioned, they will find for the plaintiff." It would have been better for the instruction to have said: "They will regard the said receipt as a continuing in force of the policy named in the declaration, from September 3, 1874, to September 3, 1875," instead of instructing them to find for the plaintiff, as the propriety of their so finding depended on other facts also. But as this is stated in the other instructions given the plaintiff, I do not think this defect in this instruction was prejudicial to the defendant; it was otherwise correct, as appears from what we have already stated. We have seen that, whatever changes the parties might agree upon may be inserted in the renewal receipt, and that the old policy remains in force subject only to such qualifications and changes as are made in the receipt on its renewal.

In *Driggs v. The Albany Insurance Company*, 10 Barb. 440, a policy had been repeatedly changed in its terms and conditions in the renewal receipts. In the last renewal, it was changed from an insurance for one thousand eight hundred dollars on a grist mill and seven hundred dollars on machinery therein, by the renewal receipt, to two thousand five hundred dollars in general terms without making any distribution of the risk, and it was held, that the company was bound in this new form of obligation, though the effect of the change was to increase the responsibility of the company. This renewal receipt in this case, was signed only by the

agent of the company, and if such agent could thus change the contract by the renewal receipt, and increase the responsibility of the company, I can see no reason why the agent in the case before us, might not cause the continuance of the policy for one year to begin on the 3d day of September, 1874, instead of on August 15, 1874; especially as this change really did not in any degree increase the responsibility of the company.

The apparent authority of the agent to sign such a receipt, and make such a contract without the express assent of the company, by the signature of president and secretary to the receipt, it seems to me sufficiently appears from the fact, that the agent was the acting agent of the company in taking policies and in renewing them in Jefferson county; and especially from the tenth section of the policy which he had given the plaintiff and which declared, that "this insurance may be continued for such further time as shall be agreed on provided, the premium thereon is paid and endorsed on this policy or a receipt given for the same."

The plaintiff it seems to me, had a right to regard this agent as having authority not only to receive the premium, which he unquestionably had, but to give for it a receipt. This was his apparent authority, and this power as we have seen could not be restrained by the company by any private instructions given to the agent and not made known to the plaintiff. The second of the plaintiff's instructions states the law correctly according to the views, which have been before expressed.

The third instruction given at the instance of the plaintiff, bases the liability of the defendant upon his knowledge, that "the plaintiff was interested in the property insured only as administrator of Amos Sheppard;" and from this alone it assumes, that it is estopped from denying, that he had an insurable interest in the property. This it seems to me a misapplication of this principle laid down in *Manhattan Fire Ins. Co. v. Well & Ulman*, 28 Gratt. 389, which is, "that a company should never be allowed to avoid liabilities on the ground, that facts of which the company have full knowledge at the time of assuming the policy, were not set out as requested by the formal words of the contract."

But unless we are prepared to say, that under all circumstances an administrator is authorized to insure against the real estate of his intestate, which we are not prepared to say at this time, it follows, that the knowledge of the company that the plaintiff was interested in the property of the administrator of Amos Sheppard, could not estop him from disputing, that as administrator he had any insurable interest in the property; as from what we have said might depend upon, whether his personal estate was or was not sufficient to pay all his debts; and if it did depend upon this, the company must have been ignorant of the facts which might depend the question, whether the administrator had or had not an insurable interest in this property.

Still the defendant, on the facts now appearing in the record, would it seems not have been injured by the court giving this third instruction asked for by the plaintiff. As we have seen, the statement in the policy, that the insured was his, established the fact, that he had an insurable interest *prima facie*, and the record does not show, that any evidence was given, which *tended* to contradict this *prima facie* case. I suppose from the whole record, that there was probably no such evidence before the jury. But there may have been, as what evidence on this subject was before the jury appears very imperfectly in the record; not having access to the requisite books now to determine the question whether an administrator can in all cases insure real property of his intestate, I decline at this time to express any opinion on this point. It seems probable from the record, that it will never be necessary to decide this point in this case, as I suppose it most probable, that the personal estate of Amos Sheppard was insufficient to pay his debts. If it should on the next trial be shown otherwise, this question will have to be decided. But we will leave it till it does arise, if it ever does. The fourth instruction of the plaintiff states the law correctly according to the views we have already expressed.

We have thus far found no error committed by the circuit court, which we can say was probably prejudicial to the plaintiff in error. But there was another instruction given apparently by the court, of its own motion, contained in the sixth bill of exception of the defendant, which was it seems

to me erroneous, and which I can not say, as far as the record shows, was not prejudicial to the plaintiff in error. This instruction is: "If the jury shall believe from the evidence, that George E. Cordell was the general agent of the Peabody Insurance Company, and that the plaintiff applied to him for a continuance, reinstatement or renewal of the policy filed with the declaration, and that the said agent received the premium therefor, but afterwards delivered to the plaintiff a different policy in another company, whether such delivery was made by mistake or intentionally, then the defendant is bound by the act of its agent in receiving the said premium as the consideration of such renewal, as if one of its own policies had been delivered to the plaintiff by said agent."

This instruction is erroneous in several respects. It states, that the defendant is bound by the acts of its agent in receiving the premium for a renewal of the policy of the plaintiff, even though such agent gave no renewal receipt. Of course this means, that the defendant is bound in this suit to answer for this act of its general agent. Now this suit was brought on a renewal of the policy, and the policy itself in its tenth section provides that "this insurance may be continued for such further time as shall be agreed on, provided the premium therefor is paid *and endorsed on this policy or, a receipt given for the same.*" But by this instruction, the policy it is stated, may be renewed or continued by the simple paying of the premium. This can not be the case, unless we are to disregard absolutely the express words of the policy defining the manner, in which it is to be renewed or continued.

It is immaterial in this case, whether the receipt of this premium alone by the agent imposed any obligation on the defendant, as if it did impose an obligation, it was one which could not be enforced in this suit. The court in this instruction not only states, that the simple receipt of the premiums by the general agent of this company imposed on it an obligation, but in the close of the instruction undertakes to define this obligation. It states, that this obligation is the same, "as if one of its policies had been then delivered to the plaintiff by said agent of the company." I apprehend, that this is clearly a mistake. Whatever obligation if any, which the mere receipt of the premium by the defendant's

agent might impose on it, when he failed to renew the policy by giving any receipt or making any endorsement on the policy, such obligation could not be the same as if a new policy had been made out and delivered to the plaintiff; even had it been, the court had in this case expressly instructed the jury, that the plaintiff would not in this suit recover on any new contract or policy. So, that this instruction was not only erroneous, but must be regarded as an instruction on a mere abstract question.

The court is not bound to give such an instruction, and it does so under circumstances calculated to mislead the jury; such instruction will be error for which the judgment will be reversed. *Pasley v. English*, 10 Gratt. 236. But though abstract, if it be not calculated to mislead, the case will not be reversed on that account. *Hunter v. Jones*, 6 Rand. 3. Now it does seem to me, that this erroneous instruction was calculated to mislead the jury. The facts, which the defence tended to prove are very imperfectly set out in the sixth bill of exceptions, or indeed in any or all of them. We may fairly infer from them, that as a matter of fact there was a dispute between the parties when trying this case before the jury, as to whether the plaintiff after calling on the agent of the defendant to continue his policy for another year and after paying him the year's premium, ten dollars, taking for it an exceedingly imperfect receipt, which he claimed to be a renewal receipt, abandoned the idea of renewing his policy with the defendant, and concluded to take out a new policy in the Nail City Insurance Company, as to whether or no he paid the additional charge for such a new policy to the same person, as the agent of this Nail City Insurance Company, and took in lieu of a renewal of his policy with the defendant, a new policy in the Nail City Insurance Company. There appears in this record evidence which tends to prove, that this was done and also evidence tending to prove, that it was not done; as for instance the retention by the plaintiff of the receipt for ten dollars, as premium in the defendant's company.

If I could see clearly, that this important question in this case was fairly submitted to the jury, and that in deciding upon it they were uninfluenced by this erroneous instruction.

tion of the court, I should be unwilling to disturb the judgment, which has been rendered. But I can not make up my mind, that this erroneous instruction of the court did not mislead the jury on this question of controversy. It would it seems to me, be very naturally regarded as a broad instruction by the court, that if the agent of the defendant received the premium of ten dollars from the plaintiff, who paid it to renew his insurance, then that nothing afterwards done by the parties could prevent the defendant from being responsible on this renewal of the policy, which they had given. If this instruction was so understood by the jury, it must have mislead them, for if the plaintiff afterwards received of Cordell a policy in the Nail City Insurance Company with the understanding, that it was received in lieu of the renewal or continuance of the policy of the plaintiff in the Peabody Insurance Company then, though Cordell neglected to take up this renewal receipt, the defendant could not be held responsible for the loss, which occurred. But if the plaintiff never agreed or intended to give up his insurance with the defendant, nor to substitute for it an insurance in the Nail City Insurance Company, then his policy in the Peabody Insurance Company continued in force, though a policy in the Nail City Insurance Company had been handed to him by accident or otherwise.

The record in this case is as I have said very imperfect; and passing my judgment on it in the imperfect state, in which it is presented my conclusion is, that this erroneous instruction of the court was calculated to mislead the jury to the prejudice of the plaintiff in error, and therefore the judgment of the circuit court of Jefferson county rendered on November 15, 1879, must be set aside, reversed and annulled and the plaintiff in error must recover of the defendant in error, as administrator, his costs in this Court expended and that a new trial must be granted; the costs of the former trials to abide the result of this suit, and the cause must be remanded to the circuit court of Jefferson county to be proceeded with according to the principles laid down in this opinion.

JUDGES JOHNSON AND SNYDER CONCURRED.

JUDGMENT REVERSED. CAUSE REMANDED.

WHEELING.

CONRAD, TRUSTEE, v. BUCK *et al.*

Submitted August 8, 1882—Decided April 7, 1883.

1. Where a bill is filed against non-residents of the State and others, to which the said non-residents voluntarily appear and answer, and afterwards the plaintiff files in the cause an amended bill containing new and material averments affecting the interests of said non-residents. No appearance is entered by the non-residents to this amended bill and they were proceeded against by order of publication. Their appearance to the original bill does not affect their status as non-residents in respect to the allegations in the amended bill, and they have the right under the provisions of sections 28 and 30 of chapter 106 of the Code to have any decree entered in the cause after the filing of such amended bill, affecting their rights, re-heard without showing any excuse for their failure to make defense before such decree was entered. (p. 403.)
2. The pendency of a suit in a foreign court, or the court of another State, will not prevent the institution and prosecution of a suit in the courts of this State for the same cause by the same party; nor will the pendency of such suit entitle a party to a stay of proceedings in a court of this State until the controversy can be determined in such foreign court. (p. 404.)
3. The assignment by one partner of all his interest in the partnership and its property to trustees for the payment of debts operates, *ipso facto*, as a dissolution of partnership. (p. 407.)
4. The dissolution of partnership revokes the authority of one partner to bind the partnership in reference to any new contract except in settling and paying the debts of the concern. And the agreement of the partners that one of their number shall wind up the business, does not enlarge his powers so as to enable him to impose any new liability upon the firm, or create a cause of action against the other partners. (p. 407.)
5. A party, who as trustee, has an interest with others in the property of a dissolved partnership, in order to prevent suits against such property, pays off a note against said partnership which he as trustee was under no obligation to pay, using his own funds for such payment. **Held:**
 - I. Such payment is regarded in law as having been made by a stranger to the transaction, and does not make said party the assignee of such note or substitute him to the rights of the original holder or payee of said note. (p. 408.)

- II. But, having paid said note at the request of the managing partner, the party so paying it will be treated as a simple contract creditor of said firm on an implied promise to pay him the amount he paid for the use of said firm. (p. 409.)
- 6 In a suit in equity brought for the settlement of an insolvent partnership, the assets of which are insufficient to pay the debts, and the contest in the suit is wholly between the creditors, the partners being non-residents and not appearing in the suit, one creditor should be permitted to avail himself of the bar of the statute of limitations against the claims of other creditors in any proper manner; for instance, by exceptions to the report of a commissioner made in the cause. (p. 410.)
7. The managing partner of a dissolved partnership has authority to insure the firm property if done in good faith, and having such authority he may charge the firm assets to refund premiums paid for such insurance by a third party at his request. The premiums so paid are part of the expenses incurred in managing the property and as such entitled to be paid as preferred claims against the firm assets, and are not affected by the statute of limitations until a settlement of the partnership accounts has been made. (p. 413.)

Appeal from a decree, with *supersedeas* to a part thereof, of the circuit court of the county of Hampshire, rendered on the 10th day of September, 1880, in a cause in said court then pending, wherein Holmes Conrad, trustee, was plaintiff, and William M. Buck and others were defendants, allowed upon the petition of said Conrad.

Hon. James D. Armstrong, judge of the fourth judicial circuit, rendered the decree appealed from.

The facts of the case are stated in the opinion of the court.

Holmes Conrad, for appellant, cited the following authorities; 29 Gratt. 697; 17 Gratt. 336; 2 Lead. Cas. Eq. 281; 6 Watt. & S. 190; 2 Patt. & H. 11; 2 Gratt. 372; Pars. Part. (3d ed.) 174.

D. B. Lucas, for appellant, cited the following authorities: 16 W. Va. 625; 17 Gratt. 321; 7 Gratt. 380; 2 Munf. 352; 7 W. Va. 63.

C. W. Dailey, for appellees, cited the following authorities: Acts 1875 ch. 56 p. 128; Code ch. 124 § 14; *Id.* ch. 106

§ 26; Acts 1870 ch. 109; 17 W. Va. 278, 288, 298; 28 Gratt. 716, 723; 32 Gratt. 482; 8 Ohio 328 (32 Am. Dec. 722); 1 Coll. pp. 186, 187 § 109; *Id.* § 401 note; *Id.* § 107; Pars. Part. 522; 5 Johns. Chy. 525, 526; 1 Rob. 93; 17 Gratt. 335; 5 Leigh 633; Pars. Part. 420, 423; *Id.* 160, 174, 175; 10 Ia. 451; 1 Coll. § 102.

SNYDER, JUDGE, announced the opinion of the Court :

By written agreement, between John R. Ricards, John N. Buck and Thomas L. Blakemore, dated October 19, 1849, the said parties agreed to form themselves into a partnership under the firm name of Ricards, Buck & Blakemore, for the purpose of purchasing certain lots and tracts of land in and near Watsonstown—Capon Springs—in the county of Hampshire and State of Virginia, and of erecting thereon an extensive hotel and other improvements, the said Ricards to furnish one half and the other partners one fourth each of the capital which was to be thirty thousand dollars, and the profits, losses and expenses to be shared by each partner in the proportion of his interest in the firm, the partnership to continue five years from date and no partner to assign his interest in the firm or its assets without the written consent of the others. Afterwards, by two deeds, the one dated November 1, 1849, and the other December 27, 1849, H. M. Brent and others trustees of Watsonstown conveyed to said John R. Ricards, John N. Buck and Thomas L. Blakemore certain lots of land in said Watsonstown, and between said date and the 16th of April, 1852, two other tracts or parcels of land in said county were conveyed to said partners in their firm name. The said firm erected on said Watsonstown lots an extensive hotel, known as the "Mountain House," and other improvements for the accommodation and entertainment by them and their lessees of travelers and visitors to the Capon Springs, and purchased and placed in said hotel a large amount of personal property, consisting of household and kitchen furniture, &c. The said firm and their lessees thereafter used said hotel, personal property and premises in the business of hotel-keeping until the same was sold under a decree in this suit. By deed, dated July 3, 1850, the said John N. Buck, with the written consent of the other partners, conveyed the

one half of his one fourth interest in the said firm and its property to William M. Buck and from that time the said William M. Buck became, also, a partner in said firm, holding the one eighth interest therein.

The said John R. Ricards and one Richard J. Frisby, partners composing the firm of Ricards, Frisby & Co., of Baltimore city, failed in business and by deed, dated May 3, 1852, and duly recorded in said Hampshire county May 4, 1852, the said partners of the firm of Ricards, Frisby & Co. conveyed, assigned and transferred to John H. B. Latrobe and George W. Dobbin of the said Baltimore city, all their goods, wares, merchandise, stock in trade, and all estate, property, interests and debts of every kind, wheresoever situated, belonging to said Ricards and Frisby as co-partners or to either individually or in which they, or either of them, have any interest, in trust to secure the payment of all the just claims of all such creditors of the said John R. Ricards and Richard J. Frisby as should within sixty days from the date of said deed execute and deliver to said Ricards and Frisby a full release from all such claims, but the said trustees shall first apply the individual property of each partner to the payment of his individual debts and likewise the partnership property to the partnership debts of said firm. The names of the creditors secured by this deed do not appear therein, or elsewhere in this record, nor is it shown that any creditor ever accepted the conditions of said deed, nor that the trustees have ever paid anything to any creditor.

The said Thomas L. Blakemore, having, also, become insolvent, he, by deed dated July 8, 1853, and promptly recorded in said Hampshire county, conveyed to Giles Cook, trustee, all his interest and estate in all the real and personal property of the said firm of Ricards, Buck & Blakemore, in trust to secure the payment of certain debts and to indemnify certain endorsers therein mentioned, including among the latter William M. Buck and James R. Richards. And, by deed, dated January 1, 1861, the said John N. Buck conveyed to said William M. Buck all his remaining interest in the said firm of Ricards, Buck & Blakemore, thus making said William M. Buck the owner of a one fourth interest in the property of said firm.

In December, 1860, John N. Buck and William M. I. instituted their suit in the circuit court of Warren county, Virginia, against Thomas L. Blakemore, John R. Ricard, William H. Hoffman and John H. B. Latrobe and George W. Dobbin trustees and others, for the purpose of having a settlement of the partnership of Ricards, Buck & Blakemore and an account of the debts of the individual members, having a sale of the real and personal property of said firm under a decree of the court. A decree was made in said cause on the 29th day of March, 1861, ordering a sale of all the real and personal property of the said firm of Ricards, Blakemore & Blakemore, and also referring the cause to a commissioner for a settlement of the partnership accounts with view to the distribution of the proceeds of the sale. The suit rested until 1869, when Commissioner Turner made his report in the cause, in which he reports the following debts as due from said firm, viz: To Wm. M. and John N. Buck three thousand three hundred and sixty-two dollars and twenty-four cents; to Latrobe and Dobbin trustees fifteen thousand three hundred and sixty-eight dollars and sixty-six cents; and to John Ward one thousand seven hundred and eighty-seven dollars and fifty-eight cents, all due January 1, 1869. This report was by decree of December 15, 1871, confirmed; but, subsequently, the said suit was transferred to the corporation court of the city of Winchester in which court by a decree thereof entered on the 22d day of October, 1878, the said decree of confirmation was set aside, and the cause again referred to a commissioner to settle said partnership accounts, &c. And by another decree of January 25, 1879, the cause was again referred to a commissioner to report upon the matters required by the aforesaid decree of March 29, 1861, with instructions to the commissioner to regard the said report of Commissioner Turner as *prima facie* correct. No report appears to have been made under this decree or any further proceedings in the cause so far as the record here discloses.

The plaintiff in this suit, Holmes Conrad, on the 8th day of June, 1875, held the bond of W. B. Buck, Wm. M. I. John N. Buck and James R. Richards for three thousand dollars, and, also, the note of the same persons, other

John N. Buck, for five hundred and eighty-three dollars and thirty-six cents, and on that day he instituted his suit in the county court of Hampshire county against said debtors, John H. B. Latrobe and George W. Dobbin, trustees, and others, for the purpose of attaching and subjecting to the payment of his said debts the interests of said Wm. M. Buck, John N. Buck and James R. Richards—they being non-residents of the State—in the real estate and personal property of the the said firm of Ricards, Buck & Blakemore in said county. By the consent of the parties a decree was entered directing the sale of said property; a sale was made on the 16th of August, 1876, and by a subsequent decree said sale was confirmed and the proceeds thereof amounting to over eleven thousand dollars, were placed in the hands of the receiver of the court. Pursuant to a decree entered in said court a commissioner made and filed his report showing the liens on said property, which said report was by a decree passed June 6, 1877, confirmed without exceptions. Subsequently, the cause was removed to the circuit court of said county and by a decree entered by said circuit court, April 22, 1878, the said decree of the county court of June 6, 1877, was set aside on the petition of Latrobe and Dobbin, trustees. The cause having been again referred to a commissioner; on March 24, 1879, Commissioner Gilkeson reported: 1st. That the only partnership debt due from said firm of Ricards, Buck & Blakemore is a debt in favor of John Ward for two thousand four hundred and eighty dollars and ninety-three cents; 2d. That after the payment of said debt, Latrobe and Dobbin trustees for John R. Ricards are entitled to be paid their account for money paid to Wm. H. Hoffman and for insurance on the property of the firm, aggregating twenty-two thousand five hundred and sixty-eight dollars and thirty-four cents as of April 17, 1879; and 3d. That after the payment of these two debts the plaintiff's debts by virtue of his attachment are the first lien on whatever remains of the interests of Wm. M. and J. N. Buck in the property of said firm.

By decree of September 12, 1879, said report as to the debt of John Ward was confirmed without objection, and the other matters therein having been excepted to by the plaintiff, the report as to them was re-committed to said commis-

sioner, who on February 11, 1880, filed his final report conclusions of which are as follows:

1st.—That the firm of Ricards, Buck & Blakemore is indebted to Wm. M. Buck and John N. Buck, March 1, 1879, three hundred and ninety-six dollars and thirty-nine cents.

2d.—That said firm is indebted to Latrobe and Dobbin, trustees, at same date, twenty-one thousand eight hundred and sixty-one dollars and twenty-six cents.

3d.—That these two sums and the Ward debt be allowed greatly exceed the proceeds of the sale of the property of said firm, the said proceeds being about eleven thousand dollars.

To this and said commissioner's report of March 24, 1880, the plaintiff, Conrad, excepted on the following grounds:

"1. That the commissioner has undertaken to adjudicate and to determine the character and amount of the claim of Messrs. Dobbin and Latrobe, trustees, although it appears that this claim is now the subject of a suit in chancery instituted for the sole purpose of ascertaining the state of the partnership accounts long before the institution of this suit and yet pending in the Hustings court of Winchester, which proceedings Messrs. Dobbin and Latrobe are pursuing and are now before that court asserting said claim, and the same yet remains unascertained and altogether undetermined.

"2. The claim allowed to Dobbin and Latrobe, trustees, is not the claim asserted by them in this proceeding, but is altogether another and different claim, and held (if at all) on a different right, and wholly unsustained by any competent proof in the cause, and long since barred by time.

"3. Because by the records of Hampshire county the property in question appears as real estate vested by deed in R. Ricards, Jno. M. Buck and Tho. L. Blakemore as joint tenants, and not otherwise, and no subsequent use of this property in the prosecution of a business as co-partners could impress upon it the character of partnership assets against subsequent creditors or purchasers; and

"4. That Dobbin and Latrobe can have no claim of any kind against the fund due under the pleadings and process in the case."

The court by its final decree, entered on the 10th day of September, 1880, overruled the plaintiff's exceptions to, and confirmed the said commissioner's report of February 11, 1880, and ordered the proceeds of the property of Ricards, Buck & Blakemore to be distributed:

First.—To the payment of the costs of this suit;

Second.—To the payment of the debt of John Ward, two thousand four hundred and eighty dollars and ninety-three cents with interest on one thousand one hundred and seven dollars and fifty-six cents, part thereof, from April 17, 1879; and

Third.—The residue to be paid ratably to John H. B. Latrobe and George W. Dobbin, trustees of John R. Ricards, and the plaintiff Holmes Conrad attaching creditor of Wm. M. Buck in the proportion of the amounts ascertained to be due them respectively as follows: To Latrobe and Dobbin, trustees as aforesaid, twenty-one thousand eight hundred and sixty-one dollars and twenty-nine cents with interest on nine thousand six hundred and ninety dollars and fifty-four cents, part thereof, from March 1, 1880, and Wm. M. Buck three hundred and ninety-six dollars and thirty-nine cents, with interest on three hundred and five dollars and seventy-four cents, part thereof, from March 1, 1880, till paid.

From this decree the plaintiff, Conrad, has appealed to this Court.

Preliminary to the main question, the appellant claims that the circuit court erred (1) in setting aside the decree of the county court of June 6, 1877, confirming the commissioner's report, and (2) in not delaying the proceedings in this cause until the rights of the parties could be determined in a suit brought in the circuit court of Warren county and now pending in the corporation court of the city of Winchester in the State of Virginia—the said suit having been brought before this suit for the purpose of settling the partnership of Ricards, Buck & Blakemore. These two claims it seems to me answer each other; because, if it was error for the court to decree in favor of Latrobe and Dobbin, trustees, before the final determination of the Winchester suit, then it was equally erroneous for the appellant to institute this suit and obtain a decree in his favor while the Warren county suit was pending and undetermined. But assuming that they do not destroy

each other, I am still of opinion the circuit court did not in these matters. The original bill conceded that "the interests of Wm. M. Buck, John N. Buck and John R. R. Buck and others have been ascertained and determined in a very suit now pending in the circuit court of Warren county, Virginia." The defendants Latrobe and Dobbin, then non-residents of the State, voluntarily appeared and answered said bill insisting upon and reserving their rights under decrees in said Warren county suit. Subsequently the plaintiff filed an amended bill averring, for reasons therein stated, that he did not intend by the allegations of his original bill, "to admit, to any extent, the existence of any lien or charge upon the real estate in West Virginia, securing the debt claimed to be due to Latrobe and Dobbin, trustees, that the lien of his attachment was in any way inferior to the right to the said claim of said trustees." To this amended bill said trustees made no appearance and they were proceeded against as non-residents by publication. The amended bill having introduced new and material allegations, either in conflict with or in explanation of the original bill affecting the claim of the said trustees, they could not be bound by said new allegations or any decree entered thereon except as non-residents, and as such they had under the provisions of sections twenty-six and thirty of chapter one hundred and six of the Code, the right to appear and have such decree re-heard without showing by petition or otherwise any excuse for their failure to answer before said decree was entered.

The objection on account of the pendency of the suit in the Winchester court is equally destitute of merit. While the suit is proper for a court of equity, but not for the particular court in which it is brought, the objection must be taken by plea in the court below. And in no case will the pendency of a suit in a foreign court, or the court of another State, bar the right of the plaintiff or any other party thereto, to prosecute another suit in this State for the same cause of action—1 Dan. Chy. Pr. 633; *Allen v. Watt*, 6 Md. 655; *Cole v. Flitcraft*, 47 Md. 312; *Lockwood v. Nye*, 28 Md. 515. Nor will a stay be allowed for such cause. *Phos. Sewage Co. v. Mollison*, 1 App. Cas. 780.

We now come to the material question in this cause, raised by the plaintiff's exceptions to the reports of the commissioner, which is, did the circuit court err in decreeing that the claim of Latrobe and Dobbin, trustees, should be paid, as the debt of a partner, out of the proceeds of the sale of the property of the firm of Ricards, Buck & Blakemore? This claim as presented by the record is as follows:

"RICARDS, BUCK & BLAKEMORE,

"To J. H. B. Latrobe and George W. Dobbin, trustees of John R. Ricards, DR.

For this am't paid to William H. Hoffman, a creditor of the firm of Ricards, Buck & Blakemore, in payment of his debt, and substituting the said Latrobe and Dobbin in his stead as a creditor for the sum so paid of the said firm of Ricards, Buck & Blakemore...	\$ 6,197 31
Int. on \$4,657.44, part of sum, from Jan. 1, 1852, to Jan. 1, 1869.....	4,750 58
Int. on \$1,539.89, part of said \$6,197.31, from March 1st, 1852, to 1 Jan'y, 1869	1,555 25
For this sum paid for insurance premiums on the property of said firm from the time the assignment to said L. and D. was made for account of said partnership till the said partnership could be wound up.....	3,493 23
Int. on the same from respective dates of payment.....	1,698 61

\$17,694 38

From which deduct four years' interest on principal, \$9,690.54, during war.....	2,825 72
---	----------

\$15,368 66"

This account, it will be observed, consists of but two items, (1) the "Hoffman debt," as it is called, and (2) the claim for money paid for insurance. The facts in regard to these claims as shown by the record, are as follows: After the completion of the hotel and improvements at Capon Springs the partners of the firm of Ricards, Buck & Blakemore had a settlement of their partnership affairs, and it was then ascertained that John R. Ricards, one of the partners, had overpaid his part of the outlay six thousand one hundred and ninety-seven dollars and thirty-one cents, as of January 1, 1852, for which sum the said firm gave him their note, which note the said Ricards, afterwards, transferred to Wm. H. Hoffman, of Baltimore city, in part payment of a debt due from him to said Hoffman. The said partnership, having

been dissolved by the assignment by said John R. Ricards, as one of the firm of Ricards & Frisby, on the 3d day of May, 1852, of his interest therein to said Latrobe and Dobbin, trustees, the said Hoffman by his attorney, in the summer of 1852, after said dissolution, demanded of Wm. M. Buck, one of the partners, who was then in charge of the firm property, payment of said note or satisfactory security, otherwise he threatened to bring suit. Some time after this the said Wm. M. Buck and George W. Dobbin, one of the said trustees, met at Capon Springs by appointment. The said Buck furnished to said Dobbin a statement of the condition of the said firm, showing that it had no assets except the hotel and furniture and that it owed debts to the amount of about twenty-seven thousand dollars. The creditors were urgent for the payment of their debts, and the owners were then holding said property at eighty thousand dollars and expecting to make a speedy sale of it which would be interfered with if suits were brought against it. In order to avoid suits, it was then and there agreed between said Buck and Dobbin that, if Buck would undertake the payment of all other debts from the rents and other sources, Dobbin would settle the said "Hoffman debt" and keep up the insurance on the property which was then very heavy; and that afterwards the said "Hoffman debt" was paid by Latrobe and Dobbin trustees and the property kept insured by them at an aggregate outlay of three thousand four hundred and ninety-three dollars and twenty-three cents. Dobbin, in his deposition states, that when it was agreed that he and Latrobe, trustees, would pay the "Hoffman debt," they were by such payment to "substitute themselves as creditors of Ricards, Buck & Blakemore in the place of Hoffman," and that the "three thousand four hundred and ninety-three dollars and twenty-three cents was for insurance premiums paid by Latrobe and Dobbin for insurance upon the Mountain House and its furniture by agreement among the parties; that the same was paid for Ricards, Buck & Blakemore, and was to be repaid to Latrobe and Dobbin by Ricards, Buck & Blakemore upon the final settlement of the accounts of that firm." "After the assignment by Ricards to Latrobe and Dobbin the business of said firm was never carried on except

with a view to the winding up the same as soon as practicable thereafter, and the preservation of the property and the interest of all concerned."

By the terms of the partnership agreement, hereinbefore referred to, it was declared, that no partner shall transfer his interest in the firm or its property without the written consent of the other partners. As before shown, John R. Ricards, one of the partners without the consent of the others, by deed dated May 3, 1852, made an assignment of his interest in the firm and its assets to Latrobe and Dobbin trustees. This assignment operated *ipso facto* a dissolution of the firm as of that date. This assignment would have effected a dissolution independent of the expressed stipulation in the articles of co-partnership. Pars. on Part. 400; 1 Collyer's Part. § 102.

After the dissolution of a partnership the partners become tenants in common of the social property, and the right of one partner to dispose of the interest of his co-partners in the property ceases, except so far as is necessary to dispose of the social effects and pay the debts of the firm, and his authority to bind the partnership in reference to any new contract is absolutely revoked, and he can only act in settling and paying the debts of the concern. 1 Collyer's Part. § 107 and notes. And it seems that even where a partner is, upon the dissolution, authorized to settle up the business of the firm, he cannot bind the firm by giving a note for a firm debt, *nor by way of renewal*. *Valkenburgh v. Bradley*, 14 Iowa 112; *Parker v. Cousins*, 2 Gratt. 372. The agreement of the partners that one of their number shall wind up the business, does not enlarge his powers so as to enable him to impose any new liability upon the the firm. *Myatt v. Bell*, 41 Ala. 232. After the dissolution, no partner can create a cause of action against the other partners, except by an authority conferred on him for that purpose. *Bell v. Morrison*, 1 Pet. 360; *Yale v. Yale*, 13 Conn. 185; *Montague v. Reakert*, 6 Barb. 393; *Parker v. McComber*, 18 Pick. 505.

In *Bell v. Morrison*, 1 Pet. 351, it was sought to take the claim out of the statute of limitations against the firm upon the acknowledgment of one partner. The court held that it

was not sufficient, nor admissible for that purpose. In *Lane v. Tyler*, 49 Me. 252, it was held that one partner, after the dissolution, could not bind the others by an express promise made to one who knew of the dissolution.

It was after the dissolution of the partnership of Ricards, Buck & Blakemore that the arrangement was made between Wm. M. Buck and George W. Dobbin for the payment of the Hoffman debt. The most that can be claimed for the authority of Buck to make any agreement is that he was the settling partner of the firm. He was the trustee of the other partners in charge of the firm property for the purpose of winding up the concern in such manner and with such authority, and none other, as the law conferred upon him; because no special authority is shown or claimed. He could not, therefore, in his situation create any new obligation or impose any new liability upon the firm. Nor could he make any arrangement or contract for the firm which would prevent the other partners from relying upon the statute of limitations or any other defense.

With his authority, thus limited, had said Buck any power to bind the firm by the alleged agreement, between him and Dobbin, that the said Dobbin and Latrobe, upon the payment of said Hoffman debt, should be substituted to the rights of said Hoffman? Dobbin testifies that this was the agreement at the time he undertook the payment, but Buck, who gives all the details of the arrangement between Dobbin and himself in regard to this debt, and does so, as his testimony shows, certainly without any hostility to the claims of Latrobe and Dobbin, makes no mention of any such agreement. And the improbability, that there was any such agreement, is much increased by the facts in relation to the payment made by Latrobe and Dobbin. When they paid Hoffman they took no assignment of the note from Hoffman, nor was there any agreement or understanding between them and Hoffman, that the note or the original debt was to survive its payment. Instead of producing the note, either with or without any assignment, they file in this cause as the basis of their claim an account for money paid by them for the use of the said firm of Ricards, Buck & Blakemore. If such an agreement had been actually made, the best evidence of it, and that

which would naturally have suggested itself to the parties, would have been to have taken an assignment of the note and thus kept it alive.

These facts go very far to indicate, that this agreement for substitution was an after-thought brought about, perhaps, without intentional wrong or perversion by the anxiety of the witness and the exigency of the occasion. For at the time this alleged agreement was made it was confidently expected that the property would sell for eighty thousand dollars, or near that sum, and produce an ample sum to pay off all the debts and reimburse any outlays or advances which any party might have made. It was not then deemed necessary to be over-cautious about preserving any supposed lien or priority for money advanced. The reasonable conclusion therefore, seems to be, that Dobbin was mistaken when he stated that an agreement for substitution to the rights of Hoffman was made between him and Wm. M. Buck at the time the arrangement was made for the payment of the Hoffman debt.

But conceding that such an agreement had been attempted, under the authorities above cited it would have been inoperative against the firm or any of its members, except said Buck, and could not be set up in this suit so as to affect the partnership-property. For to allow it to affect the partnership-property would be in effect to bind the other partners by taking from them a part of the assets which they would otherwise receive. It does not appear out of what funds the said Latrobe and Dobbin, trustees, paid said debt, and as it was not one of the debts secured by the trust-deed to them, from Ricards & Frisby, they had no right to pay it out of the trust-funds, and we must, therefore, conclude that they did not, in that respect, violate their trust, but that they paid it out of their own private funds. They were under no legal obligation to pay it, and having paid it, they necessarily did so voluntarily and as strangers to the transaction. And having thus paid it at the request of one of the partners, in a court of equity they, as the equitable owners thereof, may enforce its payment. *Neely v. Jones*, 16 W. Va. 625; *James v. Stephens*, 2 Pet. & H. 11; *Douglass v. Fagg*, 8 Leigh 588. But by such payment they cannot certainly be in any better

situation than a surety, who pays off the debt of his principal. And it is well settled, that where a surety pays a debt of his principal, which is evidenced by bond, the surety is not substituted to the rights of the creditor so far as to make him a bond-creditor. The payment completely discharges and destroys the bond and leaves the surety to his remedy on his account for money paid for the use of his principal. The only contract available to the surety after such discharge of the bond, is an implied promise that the debtor will repay him the amount so paid for his use. *Powell v. White*, 11 Leigh 309; *Kendrick v. Forney*, 22 Gratt. 748; *Copis v. Middleton*, 4 Russ. R. 277.

Latrobe and Dobbin being, then, simple contract-creditors of the firm of Ricards, Buck & Blakemore upon an implied promise, that the firm will pay them the amount paid by them to Hoffman for the use of the firm, the statute of limitations would bar the said claim at the expiration of five years from the date of such payment. But in order that the statute of limitations may be made available, it must be pleaded formally at law, or relied on in some form in the court below in equity. This may be done in equity by demurrer, plea, answer or by exceptions to the report of a commissioner in proper cases. It remains, then, to enquire whether the statute was in this case so relied on in the court below as to make it available to the appellant here.

The partnership of Ricards, Buck & Blakemore is utterly insolvent, the assets being entirely insufficient to pay all of its debts including that of Latrobe and Dobbin. None of the partners have answered the bill and John R. Ricards is not even a party to the cause. This is a contest among the creditors of the firm and a creditor of part of the individual members of the firm. In *Feamster v. Withrow*, 9 W. Va. 296, which was a contest over the estate of an insolvent debtor, the cause had been referred to a commissioner and the debtor failed to file exceptions, but some of the creditors excepted to the debts of others on the ground that the debts so excepted to were payable in Confederate money and should be scaled. It was objected that the right to rely on such defense was personal to the debtor and could not be made by a creditor of the debtor. The Court, in its opinion,

held that: "In all cases of this sort, each creditor interested in the trust subject, and who is a party, should be allowed to appear before the commissioner, and should be permitted, there, if he chooses, to contest the claim of any other creditors"—citing 1 Story's Eq. § 548; *Wilkins v. Gordon*, 11 Leigh 547; *Griffin v. Macauley*, 7 Gratt. 476; 9 W. Va. 323.

In *Woodyard v. Polsley*, 14 W. Va. 211, this Court held that: "The statute of limitations may be relied on before the commissioner, even where it has not been pleaded before the court prior to the order of reference." And also: "Where a reference is made to a commissioner to settle the accounts of an intestate, the creditors may appear before the commissioner and contest the claims of each other." And they may so "contest such claims on the ground that they are barred by the statute of limitations." *Wordenbaugh v. Reid*, 20 W. Va. 588; *Crawford v. Carper*, 4 *Id.* 56, 71.

Under the terms of the statute of limitations, which declares that, "no suit or action shall be brought" after the prescribed limit, the courts at first held, even in actions at law, that it was to be taken as an absolute bar, and operated by its own force, *and without being pleaded*. But it was afterwards determined that, although the action might appear from the declaration to have been brought after the prescribed limit, still as the plaintiff might be within some of the various exceptions mentioned in the statute, this doctrine was incorrect; and the rule was established that, *in all actions at law*, where the defendant wished to rely on the bar of the statute he must plead it. In a court of equity, however, it is different. In that court it is well settled, that if it appear on the face of the bill that the suit is barred by the statute, a demurrer will lie to it. Because if the plaintiff's case is within any of the exceptions of the statute the fact must be stated in the bill—Ang. on Lim. § 294; Story's Eq. Pl. §§ 378, 389, 390; *Kane v. Bloodgood*, 7 Johns. Ch. 90.

Without intending to decide whether or not in all cases one creditor may avail himself of the bar of the statute of limitations against the claim of another creditor, I am of opinion, upon both reason and authority, that in suits brought for the liquidation and settlement of insolvent partnerships when the fund is insufficient to pay all the debts and the

contest is wholly between the creditors of such partners and the partners do not appear in the cause in any manner. No one creditor should be permitted to avail himself of the provisions of the statute of limitations against the claims of other creditors in such suit in a court of equity in any manner allowed by the practice in such courts whether it be by plea, answer, demurrer or exceptions to a commissioner's report made in the cause. In such cases the fund is the matter in controversy, and is generally in the hands of the court or the surviving or settling partners who hold it as trustees for the benefit of creditors. The reasons which permit the creditors of the estate of a decedent to rely on the statute of limitations, or in any other legal mode to contest the claims of others, other, it seems to me, apply with equal force to cases of this character. I, therefore, think and hold that the appellant here has the equitable right to rely on the statute against the claims of the appellees, Latrobe and Dobbin, to the same extent and with equal effect as if it had been relied on by the members of the partnership.

The Hoffman debt was paid off by Latrobe and Dobbin probably in 1852 or 1853, certainly not later than 1854 because, Wm. M. Buck says, in his deposition, that an arrangement to pay off this debt was made by him with Dobbin about the close of the spring's season of 1852 or 1853, that it was made because this debt as well as other debts were being pressed for payment. It is not presumable, therefore, that the payment was delayed beyond the year 1853 or 1854. And, moreover, the account filed by said Latrobe and Dobbin, heretofore copied in this opinion, shows that the interest is charged on four thousand six hundred and fifty-seven dollars and forty-four cents, part of said debt, from January 1, 1852, and on one thousand five hundred and thirty-nine dollars and eighty-nine cents, the residue thereof, from March 1, 1852; and Dobbin, in his deposition, says: "As stated in said account, the said payment was made in two items. The dates from which the same respectively bear interest are stated in said account." The decided inference from this statement is that said debt was paid off by Latrobe and Dobbin in 1852. But even conceding it was not paid until 1853 it was barred before the institution of the suit in the court.

court of Warren county. That suit was instituted, as we have seen, on the 29th day of December, 1860, which was more than five years, the statutory bar, after the date of the payment. The appellant regularly excepted to said claim upon the ground that it was barred by time. My conclusion, therefore, is that the said account of Latrobe and Dobbin for money paid in discharge of the said Hoffman debt was barred by the statute of limitations before the institution of this or the Warren suit and cannot interfere with the right of the appellant, Conrad, to subject so much of the fund produced by the sale of the partnership property of Ricards, Buck & Blakemore as his attachment debts are entitled to in the division of said fund, after the payment of subsisting partnership debts against it.

In regard to the claim of Latrobe and Dobbin of three thousand four hundred and ninety-three dollars and twenty-three cents for premiums paid by them for the insurance of the hotel and furniture belonging to the partnership of Ricards, Buck & Blakemore I am clearly of opinion, that it, with the accrued interest thereon from the time it was paid, is a subsisting claim. This is a claim incurred for the preservation of the property and would have been allowed to Wm. M. Buck as the managing partner of the firm, if he had paid it, in the settlement of his accounts with the firm and could not have been affected by the statute of limitations until after such settlement was had. It would have been credited to him as a part of the legitimate expenses incurred in the management of the property for the interest of the firm and all parties interested therein. And he, having the authority to incur this outlay, it follows necessarily that he had the authority to bind the property of the firm by any proper agreement made by him with Latrobe and Dobbin for the payment of said premiums. *Brown v. Higginbotham*, 5 Leigh 583. But as this is a part of the expense-account incurred in the management of the trust-property, it should be paid like other expenses of the settling or managing partner properly incurred, out of the fund as a preferred claim.

I am, therefore, of opinion that the circuit court, by its decree of September 10, 1880, erred in so far as it overruled the exceptions of the plaintiff, Conrad, to the report of the

commissioner objecting to the allowance of the claim of six thousand one hundred and ninety-seven dollars and thirty-one cents in favor of Latrobe and Dobbin, trustees, known as the Hoffinan debt. Instead of overruling said part of said exceptions the said court should have sustained the same to the extent of disallowing as against the plaintiff any part of said six thousand one hundred and ninety-seven dollars and thirty-one cents and its interest, and that it should have decreed the fund arising from the sale of the partnership property of Ricards, Buck & Blakemore in the order and priorities following:

First.—To the payment of the costs and expenses of this suit including all proper commission for the care of the fund, loaning and collecting the same;

Second.—The claim of Latrobe and Dobbin for three thousand four hundred and ninety-three dollars and twenty-three cents with interest thereon from the date or dates at which the same was expended by them for the insurance of the firm property;

Third.—The claim of John Ward for two thousand four hundred and eighty dollars and ninety-three cents with the proper interest thereon till paid;

Fourth.—The three hundred and ninety-six dollars and thirty-six cents with the proper interest thereon ascertained to be due from the firm to Wm. M. Buck one of the partners thereof; and

Fifth.—The residue to be distributed ratably among the partners of the said firm according and in proportion to their respective interests in the said partnership and paid to them respectively or to the assignees of such as have assigned or transferred their interests therein, or any part thereof.

But no part of the said three hundred and ninety-six dollars and thirty-six cents, nor any part of the distributive shares of said Wm. M. Buck, John N. Buck, M. B. Buck and James R. Richards or any of them whose interests have been attached by the plaintiff, Conrad, in this cause, should be paid to them, until a sum sufficient to satisfy the two debts of the said plaintiff in his bill mentioned, should have been deducted therefrom, and said sums to the extent of the plaintiff's said debts, if sufficient, should have been ordered

aid to him, and if not sufficient, so much thereof
t be should be ordered to be paid to him on his said

therefore, considered, that for the errors aforesaid the
ree must be reversed with costs to the appellant
the appellees, J. H. B. Latrobe and George W. Dobbin,
; and this cause is remanded to the circuit court of
ire county to be there proceeded in according to the
es and directions set forth in this opinion and further
g to the rules and practice in courts of equity.

OTHER JUDGES CONCURRED.

REE REVERSED. CAUSE REMANDED.

WHEELING.

HOFFMAN *et al.* v. RYAN *et al.*

Submitted June 12, 1882—Decided April 7, 1883.

(*WOODS, JUDGE, Absent.)

whole transaction between the grantor and the grantee
deed absolute on its face shows, that after the execution of
h deed, a debt still remained due from the grantor to the
ntee, such transaction will be regarded as a mortgage, it mat-
not in what form the papers are drawn. (p. 429.)

gh the deed be absolute on its face, and a contract is made at
same time in writing between the grantor and the grantee,
ereby the grantee is authorized to sell the land or a part of it
specified time, and to pay back the consideration for the
d, yet in the absence of parol proof to the contrary such
d will be regarded as a mortgage. (p. 429.)

act, that possession remains with the grantor, will have great
ght in favor of holding the transaction to be a mortgage,
en the question is, whether it be a conditional sale or a
rtgage. (p. 430.)

owner of a tract of land executes a deed of trust, conveying
land to a trustee to secure certain debts, and afterwards a
gment is rendered against him, which is duly docketed, and
ubmitted before Judge W. took his seat on the bench.

21	415
34	490
34	761
21	415
43	346
43	349
21	415
49	118
49	121
21	415
56	622
56	624
d56	636
21	415
58	330
21	415
60	281
60	422

he then makes a contract with a third party to advance for him the amount secured by the deed of trust, and to secure such advance mortgages this land to the person advancing the money for him, and such mortgagee pays off the debts secured by the deed of trust, it would be a complete satisfaction of these debts both in law and equity; the deed of trust becomes wholly inoperative, and the mortgagee can not be subrogated to the rights of the *cestui que trust* and have the deed of trust kept alive for his benefit, thus securing priority over the judgment-debtor. (p. 434.)

5. A decree between co-defendants, can only be based upon the pleadings and proofs between the complainants and defendants; and no decree can be made between co-defendants, founded upon matters not stated in the bill, nor in litigation between the complainants and defendants, or some of them. (p. 437.)

Appeal from and *supersedes* to a decree of the circuit court of the county of Monongalia, rendered on the 14th day of July, 1879, in a suit in chancery in said court then pending, wherein John N. Hoffman and John W. Carrace were plaintiffs and Benjamin Ryan, John W. Corrothers and others were defendants, allowed upon the petition of said Carrace and Ryan.

Hon. A. B. Fleming, judge of the second judicial circuit, rendered the decree appealed from.

GREEN, JUDGE, furnishes the following statement of the case:

John H. Hoffman and John W. Carrace, in April 1876, instituted a suit in the circuit court of Monongalia county against Benjamin Ryan and John W. Corrothers, to whom Benjamin Ryan and wife had conveyed his real estate, all of which lay in said county, to subject said land to the payment of two several judgments, in favor of the plaintiffs severally, which had been docketed prior to said conveyance of said land to John W. Corrothers. The bill made as parties defendant the plaintiffs in four other judgments, which had been obtained against said Ryan, and duly docketed, before said conveyance to John W. Corrothers, as well as two others, who were the securities of said Ryan in the debt evidenced by one of said judgments, and who had paid off the same. It also made defendant Jesse F. Fitch, to whom as trustee said Ryan and wife had conveyed by deed, duly recorded,

and, prior to the rendition of any of said judgments to
r notes of one thousand dollars each, payable respect-
a one, two, three and four years from April 3, 1874,
terest from that date, and the proceeds of which notes
be distributed among his creditors. Said deed of
nd notes to Fitch were executed by said Ryan, who
en declared a bankrupt by the district court of the
States, at the suit of John W. Corrothers and others.
real questions in controversy in this cause were,
r the conveyance made by Ryan and wife to Cor-
named in the bill, was an absolute sale and convey-
s on its face it professed to be, a conditional sale with
to re-purchase within three years, or a mortgage to
moneys advanced for the use of Ryan by Corrothers,
o an old debt of five hundred and thirty-seven dollars
ty cents due to Corrothers from Ryan, prior to his
ge as a bankrupt; and whether Corrothers having paid
creditors of Ryan, who had been secured by the deed
to Fitch, trustee, was under the circumstances of the
titled to be subrogated to their former rights and to be
titled to the benefit of the deed of trust executed to Fitch,
a. If he was, as the court below decided, entitled to
s subrogated, his debt would have priority over all the
ents named in the bill, including the plaintiffs' two
ents. If he was not, and the deed to him is to be re-
as a mortgage, then all the judgments named in the
uld have priority over his debt, which in this view of
e became only a lien from the time the deed or mort-
o him was executed.

facts disclosed by the record bearing on these contro-
questions are as follows: John W. Corrothers, who
debt against Benjamin Ryan, with other creditors insti-
proceedings against him in the district court of the
States to have him declared a bankrupt, and to dis-
the proceeds of his property among them. His debts
ted to some thirty thousand dollars and his assets to
four thousand dollars; and after the payment of all
gave on the final distribution about fifteen per cent.
debt to each creditor. Pending the suit, Ryan pro-
to all his creditors a compromise, whereby all his prop-

erty real and personal was to be sold and conveyed to on his agreeing to pay therefor four thousand dollars interest from April 3, 1874. One thousand dollars with interest thereon, being payable each year from that date for four successive years. All of his creditors agreed to this proposal except Corrothers, who according to his testimony in this cause refused to agree to it, unless Ryan would give a bond with good security for two hundred dollars as a consideration for his agreeing to this compromise. According to Ryan's testimony Corrothers agreed, that if this two hundred dollar bond with security was given, he would be satisfied in satisfaction of the debt and sign his name to the proposed compromise.

The bond was given, and the compromise proposed was signed by all the creditors, including Corrothers, and approved by the court, and a deed executed by the assignee in bankruptcy, conveying to Benj. Ryan all his real property being three parcels of land in said county containing together about two hundred and seventy acres, and a deed of conveyance was executed by said Ryan and wife to the assignee, Jesse Fitch, as trustee, conveying all of said land in trust to secure the purchase-money, the said four notes of one thousand dollars each, with interest from April 3, 1874, payable in two, three and four years respectively. This deed of conveyance was dated September 13, 1875, and was duly recorded on September 27, 1875.

After this compromise had been made, Ryan proposed to his creditors to pay them on April 1, 1876, ten per cent of their debts in full of their demands under this deed of compromise, and he drew up a paper to that effect, dated March 3, 1876, which was signed by eighteen of his creditors, whereby they agreed to this proposition, and further agreed to give to the bearer of that paper a proper voucher to the trustee, Fitch, when they were paid by the bearer of this paper this ten per cent. on their respective claims. Some four others of his creditors subsequently agreed to this arrangement. The whole amount of the claim of these twenty-two creditors was eight thousand four hundred and forty-six dollars and ninety-five cents. There were however five of his creditors, who would not make this arrangement; their claims amount

ousand eight hundred and twenty-four dollars and eight cents, and they afterwards took for their claims in after stated six hundred and eighty-one dollars and five cents or about eleven and three fourths per cent. money, with which Ryan expected to purchase up these at ten per cent., and thus make about fifty per cent. his creditors on the amount advanced, as the trustee, would pay about fifteen per cent. on these claims, he ed to raise from Dille & Johnson. They were to get a ance of the land from Ryan and wife; Ryan drew the o them and signed it himself, but his wife never signed it never was delivered; thus the arrangement was up.

r Ryan had been discharged as a bankrupt, he incurred e debts, for which judgments were had against him, were all regularly docketed. There were seven or udgments; the first of which was rendered on April 75, and the last on March 11, 1876, and with interest eptember 18, 1878, they amounted in the aggregate to hundred and five dollars and fifty-three cents. They udgments named in the bill in this cause. Nothing er paid on them by Ryan. Dille & Johnson were of the existence of these judgments and expected, if rrangements with Ryan had been completed, to have em off.

n states, that his arrangement with Dille & Johnson at they would pay off the trust-debt to Fitch, the , all these judgment-liens on this land, and give to him our hundred dollars on Ryan's giving to them the et, which he had made with certain of his creditors ten per cent. on their claims; and Ryan and wife o execute to Dille & Johnson a deed for the land. But hers had in his possession this agreement with the credi- take ten per cent. on their claims, and he refused to up. Ryan says, that Corrothers told him the farm orth more than Dille & Johnson were proposing to pay and said he would loan him Ryan, the money to pay he amount due on April 3, 1876, or that he would pay ney to Fitch for Ryan on his making him safe. Ryan states that he told him he would like to have about

three years to sell the place, if he and Corrothers made an agreement. He asked how Ryan could secure him and suggested, that Fitch should transfer to him the notes Ryan had given for the purchase-money, when Corrothers paid off. He Ryan, told him, that Fitch could not assign the notes to him, and that Fitch said, that he Ryan, would not pay off the notes, or some one for him, and when so no one could hold this lien. He Corrothers, then said Ryan would have to make to him a deed for the land to secure the money he was to advance, and that he would give him three years to sell it for the amount, which was advanced on the land and would also give Ryan an instrument in writing of the same date as the deed to show, that Ryan was to sell the land within three years in which to sell the land, and that he was to pay all he could make within the three years, over and above the purchase-money. He says, that Corrothers was to satisfy these judgments and was to have his old debt against Ryan then amounting to five hundred and thirty-seven dollars and fifty cents, and the balance was to be his Ryan's; and he says he was also to furnish him three hundred dollars, of which one hundred dollars was to pay taxes, and two hundred dollars was to give him Ryan, a start.

The deed, which in carrying out this arrangement was made by Ryan and wife to Corrothers, was copied from the deed, which Ryan had drawn to be delivered to Dille & Johnson, a few days before. This deed to Corrothers was dated March 20, 1876; the consideration named in it, was the unpaid balance on the purchase-money notes, which Corrothers had executed to Fitch, trustee. All the lands conveyed by the deed said to contain two hundred and eighty-five acres, except six and one fourth acres, which had been sold to Z. M. Dille; and Ryan bound himself to deliver possession of the land on April 1, 1876. Ryan says, that while a son of Dille & Johnson, Hull was copying this deed to Dille & Johnson, he told Corrothers he thought the deed ought to show that the money he was to pay. It ought to show that he was to satisfy these judgment notes against Ryan, and the balance of the money, this three hundred dollars, which he was to leave him; that if it did not, Ryan said some lawyer told him it would be a fraud on its face. Corrothers said, he would

have it changed; and Corrothers then drew up a paper, after reading which to him Ryan, he said, that he Ryan, was not paying any rent; that he was to pay him Corrothers, eight per cent. per annum on the money. Corrothers then said, that it amounted to the same thing, only he called it rent in place of interest. Ryan says he told him he did not think it right that the taxes should be put in the agreement—and he says he wanted him to put the three hundred dollars which was to be paid to him Ryan, in the agreement. He said it would not do to put it there, if he did they would make him pay it over; but he would give him two hundred dollars, and would lift the tax receipts against the land, and hand them to him, Ryan. This written agreement was as follows:

“Whereas, the said Ryan has this day sold to the said Corrothers two hundred and seventy-nine acres of land for the sum of three thousand and thirty-nine dollars, and the said Corrothers doth agree, for the said Ryan, to sell the said land, and to have all he can make over and above the purchase-money, within three years from this date, and to reserve the homestead, or any part thereof, when enough of the rest is sold to satisfy the said claim. The said Ryan does agree to rent the land for two hundred and forty-two dollars from the said Corrothers, cash, to be paid on the 1st of April, 1877, and all taxes, and for two years after for the same amount and conditions.

“And it is further agreed that if the said rent is not paid or to even become due, then this article is null and void and of no effect.

“And it is further agreed that the said Ryan has turned over a certain article or contract between some of his creditors and the bearer, for which the bearer has agreed to pay ten per cent. for said claims; and the said Corrothers doth agree to give to the said Ryan all above the ten per cent. after the said Corrothers has received his ten per cent. and five hundred and thirty-seven dollars and fifty cents, after deducting the per cent. out of said five hundred and thirty-seven dollars and fifty cents, and if the last does not pay the five hundred and thirty-seven dollars and fifty cents, it is to come out of the price of the land; and the said Corrothers

does agree to buy all of the claims he can get at ten per cent.

"JOHN W. CORROTHERS
"BENJAMIN RYAN."

The father of the young man, who copied the deed to the Corrothers, also testifies, but his testimony is very vague. He says he was present when the papers were executed. He says Ryan wanted something inserted in the agreement or deed, that was not in them, and Corrothers said, that if the amount received by Ryan was inserted it may have been one, two, three, four or five hundred dollars, which he does not remember, he Corrothers would have to pay it again; and that it was not inserted, but Corrothers agreed to pay him. His recollection on the subject, was in other respects, so vague, as to throw no real light on the transaction. Corrothers, in his deposition, gives no details of the circumstances attending the execution of this agreement on March 20, 1876, and of the deed of that date; he simply says, that this paper contains the *whole* of the contract between him and Ryan.

In carrying out his contract Corrothers paid to the thirteen creditors, who had agreed with Ryan to take ten per cent. on their claims, as also to four others, who subsequently agreed to do so, eight hundred and fifty-five dollars when he settled afterwards with Fitch and made him payments on the notes, which Ryan had given him for the purchase of this land, he received from Fitch, on account of these claims, about fifty per cent. more than he had paid, about one thousand two hundred and eighty-two dollars; he also bought up five other claims against Ryan, and secured by this deed of trust for six hundred and eighty-one dollars and twenty-five cents, and he got from Fitch, the trust money, the dividend further about eight hundred and seventy-five dollars and sixty-five cents, or about one hundred and ninety-two dollars and forty cents in excess of what he had paid on these five claims. The excess on the others being some five hundred and twenty-five dollars, making on all the claims purchased of the creditors of Ryan, a profit of about six hundred and twenty dollars.

Corrothers paid to Fitch the full amount, which remained

from Ryan to him under the deed of trust of September 1875. The first of his payments was made April 1, 1876, for eight hundred and eighty-two dollars and sixty-four cents; the second payment was April 2, 1877, and was for one thousand one hundred and eighty dollars; and the third payment was of one thousand two hundred and forty dollars, and this was in full of the entire balance due by Ryan to Fitch, trustee, secured by this deed of trust. The money was given by Fitch, trustee, for these several sums were acknowledged as "received of Benjamin Ryan by the hands of John Corrothers," and they were stated to have been received in full of the payments on the face of these receipts.

The notes of Ryan to Fitch were not transferred, assigned or covered by Fitch to Corrothers, he stating in his deposition that he did not think he had any authority to transfer or assign these notes of Ryan's. He told Corrothers so, and, when Fitch doubted whether he Corrothers could have the effect of any lien by paying the money, and he had better pay it before he paid the money. When the last note was paid nothing was said on the subject; when the other payments were made he told Corrothers, that he was not authorized to receive money from anybody but Ryan, and he would show receipt to him as coming from Ryan, but would show the receipt, that the money came through Corrothers' hands, and in this way they were all drawn.

When Corrothers made the first payment for Ryan, he did not know of any purchase which Corrothers had made of Ryan, he heard of it afterwards, and was shown the agreement by Corrothers. Corrothers said, when he gave the receipts as he did, that he was willing to risk the payments as they were made. Another witness, Mackey, testified that a short time previous to the agreement between Corrothers and Ryan, he spoke to Corrothers about these payments, which had been obtained against Ryan, and asked him if he did not think he would have them to pay if he sold the farm, and he answered by saying, that he expected to sell.

This is all the evidence bearing on the question, as to the character of this transaction of March 20, 1876, between Corrothers and Ryan. In carrying out this agreement, Ryan

made a verbal contract with one Wm. Lyons, to sell him land for four thousand one hundred dollars, payable in on time. But it was never consummated, because of culties about the terms interposed by Corrothers. This within a few months after the agreement of March 20, 1 was made. Lyons was able to pay for this farm the price agreed to pay. About the same time, Ryan was negotiating a sale of this land to one Brown, for four thousand dollars of which one thousand dollars was to be paid in cash. This was broken off because Corrothers would not make the deed to Brown, but he said, that if he was paid his money he would destroy the deed which Ryan had made him, and then he would make the deed to Brown. About nine months after this contract between Ryan and Corrothers, Ryan sold to McClure twelve acres, a part of the tract including the dwelling-house for two thousand eight hundred dollars, and an agreement for the sale was actually signed by these parties, McClure and Ryan, dated December 20, 1 but this sale was also broken off by Corrothers refusing to sign the deed, and it was by the mutual agreement of McClure and Ryan canceled about a month afterwards.

I deem it unnecessary to state the details of these attempts of Ryan to sell this land, or the manner in which they were broken off. Dent, commissioner, under an order of the court in this cause, made a report of the liens on the land in which he placed Corrothers' lien as the first lien and the judgments against Ryan in the order, in which they were obtained, as subsequent liens. A consent decree was entered on the 30th of March, 1877, in accordance with the view, whereby a sale was ordered of this land to pay the liens; and a sale of it was made, but the court afterwards, on affidavits showing that this decree had never been complied to by some of the parties, set aside this consent decree. Being afterwards satisfied by the decision of this Court in *Marion v. Fahey*, 11 W. Va. 482, that it had in this suit the authority to set aside this decree of March 3, 1877, except by consent it, by consent annulled this order, and then by consent, set aside the decree of March 3, 1877, as well as the sale made under it. A motion was made to appoint a receiver, to take possession of this land, on the ground

Ryan, in whose possession it then was, was committing waste. Twelve affidavits were taken in support of and in opposition to this motion. The court overruled it, but by consent of Ryan, enjoined him from committing waste.

On March 27, 1878, the court ordered, that this cause be re-committed to a commissioner, to ascertain and report the several liens on the land in the bill and answers, describe their character, priorities and amounts, and to whom due. And it provided, that a publication should be equivalent to the service of notice on all parties to the suit, and on all parties interested. The answers of Ryan, Corrothers and certain of the judgment-creditors had been filed, in which Ryan and the judgment-creditors insisted, that if Corrothers had any lien on the land, which they denied, it was subsequent to the liens of the said judgment-creditors of Ryan.

On February 27, 1879, Commissioner Brown reported, that the aggregate of the liens against the said land, with interest calculated thereon to the 18th of September, 1878, is as follows: First, a judgment in favor of John W. Corrothers for three receipts given by Fitch to Corrothers, before referred to, three thousand five hundred and sixty-four dollars and ninety-two cents; second, Watts and Harner's judgment for eight thousand six hundred and forty-eight dollars; third, a judgment of John W. Carrace, plaintiff, for ninety-three dollars and fifty-eight cents; fourth, a judgment of *Morgantown Bank v. Benj. Ryan, George W. Johnson and Horatio N. Mackey*, for three hundred and twenty-two dollars and seventy-three cents; fifth, a judgment of John H. Hoffman, plaintiff, for seventy-three dollars and forty-nine cents; sixth, a judgment of Rawley Waters for twenty-one dollars and sixty-five cents; seventh, a judgment of James V. Bougher for one hundred and seven dollars and sixty cents; total four thousand two hundred and seventy dollars and forty-five cents. The sixth and seventh, being judgments pronounced at the same court, were to be paid ratably.

The evidence showed, that the judgment in favor of the Morgantown Bank had been paid, but not by Ryan the principal in the debt, but by his sureties Johnson and Mackey, who were entitled to the benefit of it. Exceptions were filed to this report by Johnson and Carrace, and also by Ryan.

There was no basis for exceptions, except to the credit of the lien of John W. Corrothers as being first in priority as being subrogated to the lien of the Fitch deed of September 13, 1875, and to allowing as his claim the amounts paid by him to Fitch, trustee, as hereinbefore stated. But these exceptors not content with this claimed, that Corrothers had no lien, being at best but a simple contractor of Ryan; that he was guilty of fraud as shown by the evidence and, that he should be thrown out of court altogether, or at least be postponed to *bona fide* creditors, that he should be remitted to his remedies against L. McClure, &c. If he failed to avail himself of the contract with them it was his own fault, and that neither Ryan nor his honest creditors should suffer by Corrothers' default.

Ryan also excepted, because the commissioner failed to credit defendant, Ryan, with sundry payments made to Corrothers and proven, referring it is presumed to payments made by Job Hartman, on account of a small part of the land, which Ryan had conveyed to him. He objects to the crediting of the Morgantown Bank judgment, because it had been paid by his sureties, and also to a statement made by the commissioner, at Corrothers' instance, but which was not adopted by the commissioner.

The court on March 25, 1879, by its decree by the commissioner of Corrothers, corrected this report reducing the amount due to Corrothers by one hundred dollars paid, and secured by payments paid by Job Hartley, with interest thereon from April 1, 1875, until the 18th day of September, 1878, aggregating one hundred and twenty dollars and fifty cents, leaving the amount due Corrothers, as of the 18th day of September, 1878, three thousand four hundred and forty-four dollars and forty-two cents.

It then overruled all the exceptions, and confirmed the report as thus corrected; and if the sum due each of the parties named in said report, were not paid within ten days from the rising of the court, special commissioner appointed thereby were directed, after a specified advertisement, to sell said land for one hundred dollars in cash, and the balance in equal installments, payable in one and two years with interest from the day of sale; requiring not

en for these deferred payments with good security. Commissioners were required to give bond with good security, as required by law in the penalty of six hundred

the commissioners pursuant to this decree sold this land and John W. Corrothers became the purchaser at the price of two thousand three hundred dollars, and complied with the terms of sale; and the commissioners made report of the sale to the court. Benjamin Ryan excepted to this report for reasons not necessary to be stated, as they seem to be frivolous, except, that "of the gross inadequacy of price for which the land was sold," and because the attorney or agent who proclaimed at the sale, that certain parts of the land advertised for sale was owned by him, and that he would contest the sale. No affidavits were taken to support the exception, but on the contrary Hoffman, one of the commissioners, made affidavit, that he had gone on the land with a view of bidding on it; that he found it in very bad condition, and the fences out of repair, and in his judgment it was worth more than two thousand dollars. But J. W. Corrothers offered an upset bid of five hundred dollars, and gave bond with security to make his bid good.

The cause was heard on July 14, 1879, and the said John W. Corrothers having agreed to credit his debt, ascertained by the court to be three thousand four hundred and forty-four dollars and forty-two cents with interest from September 18, 1876, with the whole of the purchase-money less the costs of the sale, the sixty-three dollars and fifty cents, and also with this sum of one hundred dollars the proposed upset bid, the court directed these credits to be made on Corrothers' debt, which was a first lien; overruled the exception to this sale, and confirmed it, and ordered a deed to be made to Corrothers of the land, excepting therefrom with his consent, so much of the land as was conveyed by Ryan and wife, by deed dated December 7, 1876, to John Hartley. After deducting the expenses of sale, said commissioners were directed to pay the residue of the one hundred dollars, which they had received, to Corrothers, and were allowed three dollars for the making of said deed, to be paid by Corrothers.

On this decree, John W. Carrace and Benj. Ryan ob-

tained an appeal and *supersedeas*. In their petition while only expressly ask for an appeal from this decree, yet of the assignments of errors, were for errors committed supposed to have been committed by this Court in its decree of March 28, 1879, which decree really settled all the principles of the cause adversely to the petitioners for this appeal. The cause has been argued by the counsel for the appellant as well as the counsel for the only substantial appellee, W. Corrothers, just as if the decree of March 28, 1879, as well as that of July 14, 1879, was appealed from, though the attention of the court is called to the fact, that the summary based on the order granting the appeal, recites only the decree of July 14, 1879, as the one appeal from.

Thomas D. Houston, for appellants, cited the following authorities: 64 N. Y. 397; 7 N. H. 99; 1 Jones Mo. 976; Herm. Mortg. § 185; 27 Gratt. 740; Va. L. J (Aug. 1881) 254; 42 N. Y. 96; 36 N. H. 505; 3 Barb. 537; 3 Mortg. 372; 3 Paige 645.

P. H. Keck, for appellee, Corrothers.

GREEN, JUDGE, announced the opinion of the Court:

Many questions were raised in this case, in the opinion below, and have been argued in this Court, which in my judgment are not questions which can be considered or determined in this cause, though much evidence was taken in reference to them. It is these questions not properly in this case, which have so swelled this record. It contains three hundred and sixty-five manuscript pages, most of which have no bearing on the real questions proper to be decided in this case. In stating the case, I have merely stated enough of this foreign matter to show the questions on which I have thus attempted to have the Court act in this case; but I have not stated the facts in full in reference to them.

The first question really to be determined in this case is what is the true character of the transactions, which commenced on March 20, 1876, in Benjamin Ryan and wife executing a deed with general warranty of title, to John W. Corrothers, for the tract of land belonging to said Ryan in Monongalia county, containing two hundred and eighty

acres more or less, excepting six and one fourth acres sold to L. M. Gidley; and at the same time signing, together with John W. Corrothers, the agreement bearing date the same day, and which was a part and parcel of the same transaction? Was this a conditional sale of this tract of land, as contended for by Corrothers, or was it a mortgage as contended for by Ryan, or was it an absolute sale of the land with certain rights and privileges conferred on Ryan, with reference to this land, by this written agreement?

The law on this subject is thus stated in *Davis, Committee, v. Demming et al.*, 12 W. Va. p. 281, 282: "A conditional sale with a right to repurchase, very nearly resembles a mortgage. The distinction is, that if the money advanced is not loaned, but the grantor has a right to refund it in a given time and have a reconveyance, if the debt remains, the transaction is a mortgage, otherwise not. See *Robinson v. Cropsey et al.*, 2 Ed. Chy. 137; *Slee v. Manhattan Co.*, 1 Paige's Ch. 56; *Hicks v. Morris*, 5 Gill. & J. 75. In a case of doubt however, the court of equity will always lean in favor of a mortgage rather than a conditional sale. *Conway's Ex'r v. Alexander*, 7 Cranch 237; see also *Dougherty v. McColgar*, 275. Parol evidence, the declaration and conduct of parties at the time of the transaction or subsequently, as well as all the circumstances attending or surrounding the same are received to show, whether the transaction was a conditional sale or a mortgage; and this is done though the deed or bill of sale be absolute on its face. *Robertson v. Campbell*, 2 Call 354; *King v. Newman*, 2 Munf. 40; *Lamb v. Shears*, 1 Wend. 437; *Horner v. Kiteltas*, 46 N. Y. 605." (See also *Morris v. Executor of Nixon et al.*, 1 How. 118; *Russell v. Southard et al.*, 12 How. 139; *Pierce v. Robinson*, 13 Cal. 116; *Key v. McCleary*, 25 Ia. 191; *Crane v. Buckhannon et al.*, 29 Ind. 570; *Stupp v. Phelps*, 7 Dana 297; *Emerson v. Ahtwater*, 7 Mich. 12; *Johnson v. Huston*, 17 Mo. 58; *Sweet v. Parker*, 22 N. J. Eq. 453; *Van Buren v. Olmstead*, 5 Paige 9; *Hills et ux. v. Loomis*, 42 Vt. 565; *Mann v. Falcon*, 25 Texas 271.) And again on page 282: "The fact that by the papers executed no right of redemption exists, will be considered a matter of no importance, if it be shown by proof or surrounding circumstances, that a security or pledge for debt was intended; for a party is never

allowed to take from his debtor by any form of contract the right to redeem. See *Chapman v. Turner*, 1 Call 128; *Thompson v. Davenport*, 1 Wash. 128; *Pennington v. et al.*, 4 Munf. 140; *Scott v. Britton*, 2 Yerg. 215; *Bennett v. Holt*, 2 Yerg. 6; *King v. Newman*, 2 Munf. 40; *Holdrege v. Gillespie*, 2 John. Chy. 30; *Clarke v. Cowan*, 2 Cow. 100; *Horn v. Kiltetas*, 46 N. Y. 605. If the vendor remains in possession of the land after the alleged sale, this is a circumstance that tends to show, that it was not really a sale but a mortgage, for such continuing possession in the vendor after a sale, if not inconsistent with a sale is an unusual circumstance of a paniment of it. *Ross v. Norvell*, 1 Wash. 40; *Thompson v. Davenport*, 1 Wash. 125; *Bennett v. Holt*, 2 Yerg. 6.

The law as thus stated seems to me to settle, that the action of March 20, 1876, between Benjamin Ryan and W. Corrothers, constituted not a conditional sale, or a sale with certain rights of afterwards selling in a given time, but a mortgage. The land was sold by Ryan to Corrothers, to secure to Corrothers the payment of all the moneys he should advance for Ryan. Under the agreement in writing made at the same time, the land was also to secure the interest on said advances and the old debt then amounting to five hundred and thirty-seven dollars and fifty cents, which Ryan owed to Corrothers, but from the compulsory payment of which, Ryan had been discharged as a bankrupt, together with the interest on said debt. In other cases of mortgages Ryan, the grantor, was to remain in the possession of the said land.

It is true, that he was to pay what was called a nominal rent on this land of two hundred and forty-two dollars a year, but then on the face of this agreement he had the right to pay off the advances made by Corrothers for him, by paying the principal of it only, so that this nominal rent of two hundred and forty-two dollars, was really but a substitute for the interest on the money to be advanced by Corrothers. The agreement says this interest agreed on was eight per cent. per annum, and the interest on the moneys advanced at that rate would be two hundred and forty-three dollars, or only one dollar more than this nominal rent; and this one dollar was properly allowed, because the rent was charged from a time

in advance of the time at which the money was expected to be advanced, and was actually advanced. The rents, on this land, were by this agreement to be paid by precisely what would have been done had he been a proprietor of the land. Then too, neither this nominal rent nor part of it was ever paid by Ryan, though he held the land for years.

It would be perfectly natural if it was interest secured by mortgage, but very unusual if he was really a tenant of Corrothers. The parol testimony in this case, all tends to show that the parties understood the conveyance made by Ryan and wife to Corrothers, as a mortgage and not as a sale. Corrothers states the details of the transaction, and clearly if he believed, the transaction was a mortgage and not a sale; the borrowing of money of Corrothers, and not a sale of land to him. Corrothers on the other hand, does not state the details of this transaction, but relies solely on the face of the deed and on this agreement of the same to show, that it was a conditional sale. But really this agreement on its face strongly indicates, that the transaction was a mortgage and not a sale, either absolute or conditional. It is true, that this agreement begins by saying, that Ryan this day sold to Corrothers this tract of land, but it immediately adds, that Ryan may sell this land to others and that he can make over the purchase-money, that is the amount of money that Corrothers was to advance to Ryan, at any time within three years; and that Ryan may reserve a homestead, which he had laid off and had sold, or any part of this homestead when he had sold any of the rest of the farm to satisfy Corrothers's claim. These provisions are utterly irreconcilable with either an absolute sale or a conditional sale of the land to Corrothers, but perfectly consistent with a mortgage of the land; and they seem to me to demonstrate, that the absolute sale as thereby declared by the parties to be a mortgage; and not simply a defeasance. A mortgage can as well be made by an absolute deed with a separate paper, as a defeasance by expressing the defeasance on the face of the deed.

There then it is said, that the land has this day been sold,

all that was meant was, that it had that day been converted by an absolute deed, referring to the deed made at the same time. But the next clause in this agreement is, "and further agreed, that if the said rent of two hundred and two dollars is not paid as it becomes due, then this agreement shall be null and void of effect." As no rent was ever paid, it was insisted, that this rendered the deed absolute by making the defeasance void. But the rent was a mere substitute for interest at eight per cent. per annum on the moneys advanced, and this provision is simply, that if the interest on the money secured by the mortgage is not punctually paid, then the condition or defeasance in the mortgage is to become void and the deed absolute; and this is but the provision inserted in every mortgage, and is such a forfeiture that it is never enforced, without giving to the mortgager his right to redeem after the forfeiture.

The other provisions of this agreement are, that Ryan had turned over to Corrothers his contract, which had been signed by eighteen of his creditors, whereby in view of the dividend, which they would get from Fitch, the trustee or assignee in bankruptcy, they would take ten per cent. of the amount of their claims. It was known, that the dividends of these eighteen creditors would amount to about fifty per cent. on their claims, so that the creditors agreed in consideration of getting the money at once, to abate about one-half of their dividend. Corrothers was to pay them this ten per cent., and all that was realized from the dividend on their claims above this ten per cent., it was expressly stipulated should belong to Ryan and not to Corrothers, and Corrothers agreed to buy up all the other claims for Ryan's benefit at the same rate.

In consideration of the large profit that Ryan would realize from the advance of this money by Corrothers, and from the labor of Corrothers in buying up, for his benefit, the balance of these claims at less than their value, Ryan agreed to pay him the old debt he owed him of one hundred and thirty-seven dollars and fifty cents, after deducting it with the dividends Corrothers would get from the trustee and assignee of Ryan. It is claimed, that the agreement by Ryan to pay this old debt made this trans-

tion usurious, and that this five hundred and thirty-seven dollars and fifty cents should, in the settlement between Corrothers and Ryan, be rejected as usurious interest.

But it does seem to me, that this is clearly an erroneous view. Ryan was under a moral obligation to pay this debt, which he honestly owed, though he had been discharged from its enforced payment by having been declared a bankrupt. Still he was under a moral obligation to pay the whole of it, and his promise in this agreement had there been no other consideration for such promise than this moral obligation, would have been legally binding on him, and the payment of this old debt could have been enforced against him. How then can the fact, that he received for this promise, which was at any rate binding on him without any valuable consideration, a consideration which enabled him to realize an amount exceeding the balance on this old debt, render this promise void?

The existence of this old debt, was a sufficient consideration for his promise; and his borrowing money at the same time at six per cent. did not certainly vitiate this promise. But for the money he was borrowing he was to pay two hundred and forty-two dollars a year, or about eight per cent. per annum. The excess of this interest over six per cent. was usurious, and cannot be enforced. No part of this rent of two hundred and forty-two dollars, or more properly interest, has been paid, and none of it can be enforced in excess of interest at the rate of six per cent. per annum on the money actually advanced by Corrothers for his, Ryan's, use. This rent should be treated precisely as if it had not been promised to be paid by Ryan, and in view of it, Ryan should be required to pay at the rate of six per cent. per annum on all moneys advanced by Corrothers for his benefit. In this mode this contract will be purged of all usury.

Of course, Ryan should be required to pay all the taxes on this land, and if Corrothers has paid any of them, in the settlement of their accounts the amount so paid by Corrothers in taxes, with the interest thereon, should be charged against Ryan as so much money advanced for his use, and secured by this mortgage. Corrothers can charge, as money advanced for Ryan's use secured by this mortgage, only such

sums as he paid to Ryan's creditors, and not the full amount paid to Fitch, trustee; as the contract expressly provided, that the purchase of these claims from Ryan's creditors was for the benefit of Ryan, and not for the benefit of Corrothers; and this was the case not only with the eighteen claims against Ryan, in regard to which Ryan had already made a contract, but with all the other creditors with whom Corrothers, for Ryan's benefit, should make contracts. And it applies as well to the five creditors, with whom Corrothers made contracts to pay more than ten per cent. on their claims, as to others. All these purchases of the claims of Ryan's creditors, made by Corrothers, must under this contract be regarded as made for Ryan's benefit, whether he bought them at ten per cent. or at a greater price. They were all included in this agreement with Corrothers and Ryan of March 20, 1876, no matter what per cent. Corrothers gave for them.

Of course any amount of money, which arose from the sale of land by Ryan himself prior to the 20th of March, 1876, to Job Hartley or to any one else, and which was not actually advanced by Corrothers out of his own funds, though it may have been handed over to the trustee, Fitch, by Corrothers and included in the receipts, which the trustee, Fitch, delivered to Corrothers, can not in the settlement with Ryan be charged by Corrothers as money actually advanced by him for the use of Ryan.

The next enquiry is: When Corrothers advanced under the contract of March 20, 1876, with Ryan the funds, out of which he paid off the trustee, Fitch, or the *cestui que trust* in this deed of trust, creditors of Ryan, to an extent, which they were willing to accept in lieu of their dividend under the deed of trust to Fitch, trustee, did he become entitled by subrogation, to the benefit of this deed of trust by Ryan and wife to Fitch, trustee, of date September 13, 1875? This question seems to me to involve no difficulty, but to be fully answered by the view we have taken of the transaction between Ryan and Corrothers of March 20, 1876, under which all payments made by Corrothers to Fitch, or to the creditors of Ryan, were made by Corrothers.

Whenever a debt is paid out of the funds of the debtor,

who is primarily bound for the debt, the debt is thereby satisfied both in law and in equity. This is the case even when there is a joint debtor, who is also a principal in the debt. And it is much more obviously so, when there is but one bound for the debt, and when it is paid with his funds. See *Kinley v. Hill*, 4 W. & S. 426; *Bartlet v. McRae*, 4 Ala. 689; *Jones v. Davids*, 4 Russ. 277; (3 Cond. Eng. Chy. Cas. 665.)

If the means are furnished by a third person, who is interested in keeping the debt alive, and there is no understanding that the old debt is to be kept alive, and it is paid off, though a mortgage, taken when the advance of the money was made to pay off the old debt, be pronounced void, yet, if it be paid off, it can not in a court of equity be kept alive by subrogation, so as to give priority to the person making such advance over a subsequent judgment. *Wiley v. Boyd*, 38 Ala. 635. But if instead of taking a second mortgage the person advancing the money on the promise of the mortgagee to secure him gives the money to the mortgagee, who pays it to the mortgager, whether or not he takes a formal assignment of the mortgage, it will not be regarded as satisfied but will be kept alive for the benefit of the person advancing the money. See *White v. Knapp*, 8 Paige 173; *Graves v. Mumford*, 26 Barb. 95; *Hoy v. Bramhall*, 4 C. E. Green (N. J.) 74 and 563.

In the case before us, Corrothers by the agreement of March 20, 1876, agreed to advance the funds to pay off the debt of Ryan to Fitch, the trustee. There was obviously no understanding with Ryan or with Fitch, the trustee, that the deed of trust to Fitch, trustee, was to be kept alive for the benefit of Corrothers. Fitch testifies, that his understanding was the very reverse, and therefore he gave receipts for the money to Ryan himself, as paid in satisfaction of the debt by the hands of Corrothers. It seems to me equally clear, that there was no such understanding between Ryan and Corrothers; nothing of the kind is expressed in their agreement of March 25, 1876; on the contrary it seems clear, that this was not expected by the parties, and Corrothers did not then rely on the deed of trust to Fitch, as his security for the money he was to advance, but he took a new mortgage from Ryan and his wife on this land, to secure his advances. The

parol evidence too shows that, at that time he expected to have to pay these five judgments against Ryan, evidently regarding them as prior liens to the one he relied upon.

All this is inconsistent with the idea, that there was any understanding by Corrothers with any one at that time, that the deed of trust to Fitch though paid off was to be regarded as kept alive for his Corrothers's benefit. This deed of trust must therefore be regarded as paid off by the express agreement of the parties, and that it was paid by Corrothers with the understanding, that it was fully satisfied; in fact he expressly contracted to do so. On the face of the deed executed to him this is expressed to be the very consideration, on which the deed was made.

When the circuit court held, that he was entitled by subrogation to the benefit of this Fitch deed of trust, of September 13, 1875, it must have done so on the assumption, that the transaction between him and Ryan of March 25, 1876, was not a mortgage or such a transaction as we regard it, but was either an absolute or conditional sale. And so regarding it under such decisions as *Barnes et al. v. Mott*, 64 N. Y. 397, and *McClaskey & Crim v. O'Brien*, 16 W. Va. 791, even had this deed of March 20, 1876, been an absolute sale, it seems to me under these and other decisions, that Corrothers could not have been subrogated to the rights of the creditors of Ryan, under this deed of trust of September 13, 1875. But this question I have not considered, as it does not arise; the deed of Corrothers of March 20, 1876, being clearly a mortgage.

It is claimed, that Corrothers committed a gross fraud on the creditors of Ryan, when he took a bond from Ryan with security for two hundred dollars, either in satisfaction of his five hundred dollar debt against Ryan, or as a bonus for consenting to the compromise made by Ryan with his creditors. That it was taken as such bonus and not as a satisfaction is obvious from the fact, that with Ryan's assent, he took his dividend on this debt from Fitch, the trustee. This was a fraud on Ryan's other creditors, but Ryan was fully as much implicated in it, if not more so, than Corrothers. It was a matter to be dealt with by the federal court, if it had been brought to its notice, which I presume was not done. At

any rate this Court has in this case nothing to do with it. The two hundred dollar bond has been surrendered, and the improper giving of it can in no way affect this case. It has been urged too, that the debt due to Corrothers ought not to be provided for by the court, because he was guilty of fraud in refusing, it is claimed in violation of his contract of March 20, 1876, to make deeds to Brown, Lyons or McClure, whereby Ryan has been grossly wronged.

If this be true, Ryan's remedy is clearly not in this suit. Corrothers was guilty of no fraud in making the contract of March 20, 1876, and is entitled in this suit to the benefits it conferred on him, even though he subsequently violated this contract, by refusing to make these deeds. Whether he did or not cannot be enquired into in this case. These questions in no manner arise out of the pleadings and proofs, on the part of the plaintiff and defendants, in this suit. And it is well settled, that a decree between co-defendants can only be based upon the pleadings and proofs between complainants and defendants, and that no such decree can be made between co-defendants founded on matters not stated in the bill, nor in litigation between the plaintiffs and defendants or some of them. See *Vance v. Evans et al.*, 11 W. Va. p. 370; *Elliott v. Pell*, 1 Paige 263; *Jones v. Grant*, 10 Paige 348; *Tripp v. Vincent*, 3 Barb. Ch. R. 613; *Buffalow v. Buffalow*, 2 Ired. Eq. R. 113. These matters were foreign to the objects of this suit.

It is also claimed by Ryan, that three hundred dollars was to be paid to him by Corrothers as a mere gift. This statement of Ryan is in the highest degree improbable, and the reason assigned for not inserting it in the agreement of March 20, 1876, is to me unintelligible. It is also unsustained by other evidence, and is denied by Corrothers. It is not improbable from the evidence, that there was some other understanding, probably a very indefinite one, that Corrothers would loan him some other money for his private purposes. But if it was only to be a loan, as I presume it was, Ryan has suffered no loss from its not having been made. The evidence would certainly have to be much stronger than it is to induce the belief, that Corrothers was to make him a gift of this three hundred dollars. But in

truth, no amount of proof could have been received in support of this provision to the agreement of March 20, 1876, when it appears, as it does, that it was purposely left out of it.

I have considered this cause as if the decree of March 24, 1879, as well as the decree of July 14, 1879, was before us for review, but the most of the errors assigned in the petition for an appeal, were errors on the first of these decrees. They have been argued as if this decree had been appealed from, and of course if we deemed there was any technical obstacle in the way of reviewing the decree of March 28, 1879, we would amend the order granting an appeal in this cause, and include in the appeal this decree also; but as it has been treated as though it had been appealed from by the counsel of the appellee, Corrothers, as well as by the counsel for the appellants, we deem it unnecessary to go through the form of amending the order granting the appeal, and will determine this case as if this decree of March 28, 1879, had been formally appealed from.

It was, from what we have said, so defective in confirming the report of Commissioner Brown, that it should be reversed not in part but altogether. This report of Commissioner Brown, ascertained the principal debt against Ryan upon an entirely improper basis; assuming as its basis, that he was entitled to the money, which he had paid to Fitch, the trustee, when he was really entitled to the money, which he had advanced for the use of Ryan, under the agreement of March, 20, 1876, and also to the balance due him on his old debt of five hundred dollars, due from Ryan to him before Ryan was declared a bankrupt. But there was a still graver error in Commissioner Brown's report, that of reporting the debt of Corrothers as the first lien on the land of Ryan, when in fact it was the last of those, which were reported; it being a lien only as from March 20, 1876.

When these errors are corrected, it will leave nothing of Brown's report, except the report of the judgment-liens, about which there is no controversy. I say no controversy, for it is obvious, that the sureties of Ryan who paid the judgment in favor of the Morgantown bank, are entitled to the benefit of this judgment by substitution. The entire decree

therefore of March 28, 1879, must be reversed and set aside. I say the entire decree because though that portion of it which directed a sale of the land would not be set aside if a sale under it had been made and properly confirmed, yet as the sale under it was improperly confirmed by the decree of July 14, 1879, the whole of this decree of March 28, 1879, should be reversed.

There was an upset bid of five hundred dollars offered the court on the price formerly bid, which was more than twenty per cent. on the price at which the land was knocked off. It is true that Corrothers agreed to have credited on his debt, which had been declared a prior lien on this land, the price he had bid upon it, two thousand three hundred dollars, and also five hundred dollars more, the amount of this advanced bid. But as we have concluded that Corrothers has no first lien for any amount, on which to credit these sums, and as he did not indicate his willingness to give this five hundred dollars more, except as a credit on his debt as a first lien on this land, this Court can not properly decree him to pay this two thousand eight hundred dollars for this land. Nor can it at this late day, after nearly three years have elapsed, hold G. W. Johns to his advanced bid of five hundred dollars; and therefore the entire decree of July 14, 1879, should be likewise reversed and annulled.

There is no necessity to make Job Hartley a party defendant in this cause. His land was not embraced in the deed of March 20, 1876, to Corrothers, as I understand; it having been previously sold by Ryan, nor do I suppose, that the judgments against Ryan are liens upon it. And if they were, its sale is entirely unnecessary to pay off these judgments, as the other lands of Ryan are first bound for them, and Corrothers does not even claim, that he has any lien upon this land of Job Hartley's. The circuit court will only have, when it again decrees this land to be sold, to except from the quantity so sold this land of Job Hartley's.

After reversing these decrees of March 28, 1879, and July 14, 1879, and decreeing that the appellee, John W. Corrothers, do pay to the appellants their costs in this Court expended, this Court will render such decree as the court below should have rendered, referring this

cause to a commissioner to ascertain the liens on said and their amounts and priorities, with such instructions will accord with the views we have expressed; and the cause must be remanded to the circuit court of Monro county, to be further proceeded with according to the principles laid down in this opinion, and further according to principles governing courts of equity.

JUDGES JOHNSON AND SNYDER CONCURRED.

DECREE REVERSED. CAUSE REMANDED.

WHEELING.

ISAIAH AND JOHN CUNNINGHAM v. SAYRE *et als.*

Submitted January 11, 1883—Decided April 7, 1883.

1. A motion to quash a summons in unlawful entry and detainer which summons required the defendants "to appear before the president and justices of our county court for the county of Jackson on the first day of the April term, 1880," was properly overruled, as the defendants were presumed to be at what place in the county the said court would be held. (p. 442.)
2. It is regular and proper to try an action of tort against defendants who have pleaded, without waiting for other defendants to appear and plead. (p. 442.)
3. Under section 2 of chapter 127 of the Code, where pending an action of unlawful entry and detainer the plaintiff dies, the action may be revived in the name of his heirs at law or assigns. (p. 443.)

Writ of error and *supersedeas* to a judgment of the circuit court of the county of Jackson, rendered on the 12th day of November, 1881, in an action in said court then pending wherein Isaiah and John Cunningham were plaintiffs and Ichabod Sayre and others were defendants, allowed by the petition of said defendants.

Hon. Robert F. Fleming, judge of the sixth judicial circuit, rendered the judgment complained of.

The facts of the case are stated in the opinion of the Court.

Parsons & Walker for plaintiffs in error cited the Code, ch. 89, note; 2 W. Va. 574; 4 Gratt. 86; Code, ch. 125 § 12; 8 W. Va. 308.

Henry C. Flesher for defendants in error cited Code, ch. 127 § 2; 12 W. Va. 516; 18 W. Va. 766.

JOHNSON, PRESIDENT, announced the opinion of the Court:

This is an action of unlawful detainer brought in March 1880, in the county court of Jackson county. The original plaintiff was William Cunningham, and the defendants named in the summons, were Ichabod Sayre, Austin Sayre, Wm. C. Sayre, Joel Sayre, Minerva Sayre and Charles E. Ramsay. The summons was served on all the defendants. It was suggested, that the defendants Austin Sayre and Wm. C. Sayre were minors, thereupon the court appointed Geo. J. Walker, guardian *ad litem*, to defend their interests in the suit. The defendants, Ichabod Sayre and Minerva Sayre, appeared and moved to quash the return of service on the summons, which motion the court overruled; and the same defendants moved to quash the summons, which motion was also overruled. The said defendants, Ichabod Sayre and Minerva Sayre, thereupon pleaded not guilty. No plea was entered for any of the other defendants named in the summons.

On the 15th day of June, 1880, it was suggested, that since the institution of the suit the plaintiff had departed this life; and it being proved to the court, that Isaiah Cunningham and John Cunningham were the devisees of the land in controversy, on motion of said Cunningham and against the protest of the defendants, the suit was revived in the names of said devisees; to which ruling of the court the defendants excepted. The defendant, Ichabod Sayre, was sworn before said motion was decided, and on oath stated, that R. E. Starcher, one of the justices then sitting when said motion to revive was made, was an important and material witness for defendants on the trial of the case, and that he desired to use him as such witness, and objected to said justice sitting to hear said motion to revive; which objection was overruled

by the court, and said justice did hear said motion to r and the defendants again excepted. The case was th moved to the circuit court of said county.

On the 9th day of August, 1881, a jury was empane try the issue, and it rendered a verdict for the plaintiff found that "the defendants *now in court* are guilty of u fully withholding from the plaintiffs, the land mentione described in the summons," &c. ; setting out in their v a full description of the land. The said defendants r the court to set aside said verdict as contrary to the la the evidence, which motion the court overruled, and er judgment upon the verdict against the said two defenc to which judgment the said defendants obtained a w error and *supersedeas*.

The first error assigned is, that the court overrule motion to quash the return on the summons. If ther any error in said return, for which the same should been quashed, it was as to the defendant Minerva S which error if any she expressly waived, as the record s It is also assigned as error, that the summons does not when and where the defendants therein, were requir appear and answer. There is nothing in this assignm error; as they were required to "appear before the pre and justices of our county court for the county of Jac on the first day of the April term, 1880." The defer are presumed to know the law, and they therefore *when* the term of the court must by law be held.

It is further assigned as error, that the jury were sw try the issue joined, and that they tried the case as to a defendants when none had pleaded, except Ichabod Minerva Sayre. This assignment does not correctly the facts. The case was only tried as to those defen who had pleaded. It is regular and proper to try an of tort, as an unlawful detainer, against defendants, who pleaded without waiting for the other defendants to appea plead. 1 Chitty Pleadings 97 and cases cited. It is also ins that it was error to try the case without assigning a *gu ad litem* for the infant defendants, and requiring him t One was appointed, but he did not plead, and the cas not tried as to such infant defendants. It was still fu

assigned as error, to permit R. E. Starcher, one of the justices of the county court, which decided a question in the case, to hear and decide such question after the defendant, Ichabod Sayre, had sworn before the court, that said Starcher was a material witness for him in the trial of the case.

The bill of exceptions, in which this error, if it is one, was saved shows, that the motion above referred to was to revive the action in the name of the devisees of the plaintiff, the plaintiff having died during the pendency of the suit, and and that the defendant, Ichabod Sayre, being sworn declared on oath, that said Starcher was a material witness for him in the trial of said case, and objected to his hearing and deciding said motion. The court overruled the objection and the defendant excepted. Even if the said justice was a material witness for him in the trial of the case, that fact certainly would not disqualify him to hear and determine the motion to revive the suit. The court very properly overruled the objection. It is also insisted, that it was error to revive the suit in the names of the devisees, it being earnestly contended, that an action of unlawful entry and detainer cannot be revived, but must abate on the death of the plaintiff. Before the adoption of the Code of West Virginia it was well settled, that an action of unlawful entry and detainer could not be revived on the death of the plaintiff. *Chapman v. Dunlap*, 4 Gratt. 86; *Moran v. Eldridge's Devisees*, 2 W. Va. 574.

These decisions were doubtless based upon the fact, that such an action would not survive at common law, and no statute authorized a revival of the suit. No reasons for the opinion are given in either case. The statute on the subject, when both the above decisions were rendered, is found in the Code of 1860, chapter 173 section 2, and is as follows: "Where such fact (death, etc.,) occurs in any stage of a cause, whether it be in a court of original or appellate jurisdiction, if it occurs as to any of several plaintiffs or defendants, the suit may proceed for or against the others, *if the cause of suit survive to or against them.*" Section 2 of chapter 127 of the Code of West Virginia contains the same provision, and the following material addition is made thereto: "If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be

revived and prosecuted to judgment and execution, in the same manner, as if it were a cause of action arising out of contract."

The general rule at common law was: "Whenever the death of any party happens pending the writ, and your plea is in the same condition, as if such party were living, then such death makes no alteration, for where the death of the parties makes no change of proceedings, it would be reasonable, that the surviving parties should make any alteration in the writ; for if such writ and process were changed, it would set rights but in the same condition they were before the death of the parties; and it would be absurd, that a change made no alteration should change the writ and the process, and on this rule all the diversities turn. Bac. Ab. "Abatement" (F.) Actions grounded in *tort* generally survive with the person, and actions founded on contract generally survive, although both rules were subject to exception.

When the Legislature in the statute above referred to used the language, that: "If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution, *in the same manner as if it were a cause of action arising out of contract*," it is evident, that the words referred in the last clause of the section to the general common law rule, that "*actions founded on contracts* survived." It was found, that great inconvenience arose in following this technical rule of the common law in abating actions, and the personal representative, his heir or devisee might be obliged to bring another suit to accomplish substantially the same object in view by the ancestor in bringing the original suit, and the manifest object of the statute was to enlarge the remedy so that the suit might be revived. It was not the object of the statute to create any new right, and give an action to the heir, devisee or representative, which he had not at common law. But where the representative, heir &c. had the right, by suit, to accomplish the same object substantially as the ancestor had in view in bringing the suit, that for convenience it should not abate on the ancestor's death, and might be revived.

In our view the statute clearly covers a case of un-

detainer. The ancestor brought the suit to recover possession of the land; on his death why should it abate and drive the heirs to an action of ejectment? That suit would not only give the possession, but would do more, it might settle the title of the plaintiff; but it would acquire the possession and so would the unlawful detainer. The suit, which the ancestor brought was sufficient to acquire the possession, and the statute intended in case of his death, that his heirs or devisees, who took his place with reference to that right, may revive the suit and prosecute it. It was not error to revive the suit. It is also assigned as error, that the verdict of the jury was so vague and indefinite, that no judgment could legally be rendered thereon. There is nothing in this assignment; as an inspection of the verdict and summons, to which it refers, shows clearly, that the sheriff would have no difficulty whatever in putting the plaintiffs in possession of the said land.

There is no error in the judgment of the circuit court of Jackson county, rendered in this case; and it is affirmed with costs and thirty dollars damages.

THE OTHER JUDGES CONCURRED.

JUDGMENT AFFIRMED.

WHEELING.

BURK v. BURK.

21 445
455 190

Submitted June 20, 1882—Decided April 7, 1883.

(*WOODS, JUDGE, Absent.)

1. Desertion is a breach of matrimonial duty, and is composed first, of the breaking off of the matrimonial cohabitation; and second, an intent to desert in the mind of the offender. Both must combine to make the desertion complete. (p. 450.)
2. If a wife leaves her husband's home with the intention at the time of returning, and stays a considerable time from home, and her husband requests her return, which she refuses, from that time she deserts her husband. (p. 450.)

*Cause submitted before Judge W. took his seat on the bench.

3. The intent to desert being once shown is presumed to continue until the contrary appears. (p. 450.)
4. If a husband, without an offer on the wife's part to return and live with him at his own residence, consent to take her to his own premises in a house near his residence, without a demand that she shall live in his house with him, and there visits her husband, the desertion is broken. (p. 450.)
5. If a husband changes his residence, his wife's residence is changed also, and if without a legal excuse she refuses to go with him, it is desertion on her part. (p. 451.)
6. Desertion to be ground of divorce from the bond of matrimony must continue three years. It must be a continuous, uninterrupted desertion. Two periods of desertion cannot be added together for the purpose of making up the term required by the statute. (p. 452.)
7. Desertion cannot be inferred from the mere fact, that the parties do not live together. (p. 452.)
8. Although the husband gives his wife only a meagre or no support, and denies her much of his society; puts her in a house separate from his ordinary residence, because she refuses to live at his residence and yet does not break off the matrimonial cohabitation, there can not be said to be any desertion by either party. (p. 453.)
9. If during the three years required by the statute for a divorce from the bonds of matrimony, on the ground of desertion, the husband cohabits with his wife, the desertion is broken. (p. 453.)

Appeal from a decree of the circuit court of the county of Wood, rendered on the 3d day of May, 1881, in a divorce cause in said court then pending, wherein Robert H. Burk was plaintiff, and Lucinda Burk was defendant, allowed the petition of said defendant.

Hon. James M. Jackson, judge of the fifth judicial circuit, rendered the decree appealed from.

JOHNSON, PRESIDENT, furnishes the following statement of the case:

This is a suit in equity to procure a divorce *a vinculo matrimonii*, on account of desertion for three years. The bill was filed in the circuit court of Wood county in June, 1880, and alleges, that plaintiff and defendant were married in April, 1864; that shortly after his marriage with the defendant

a Hunter, she abandoned him and went to live with
ends; that he had frequently solicited her to return to
ne, but she had at all times refused; that afterwards
modified the spirit of abandonment as to remove into
e on complainant's land, but refused to live with him
ome; that her desertion of him was commenced and
ed against his consent; that she had for more than
ars, "intentionally, maliciously and absolutely deserted
andoned your orator, and compelled him to live with-
consort, or assistance, which he was entitled to have
husband from his wife, and that for more than said
of five years she has utterly failed and refused to per-
er marital duties towards your orator, as his wife is
d by the laws of the land to do, and she has repeatedly
d to your orator her firm, settled and determined pur-
ver to return to your orator's house, or to resume her
or in anywise to conduct herself as the wife of your

On the contrary she has pretended, that she would
ide with your orator upon condition, that your orator
go and live at another place than his own house and
and would abandon his house and home." The bill
leges, that they have three children by the marriage,
ays for a divorce from the bonds of matrimony, and
custody of the infant children.

defendant answered the bill denying the charge of
on, and denying, that any offers to receive her into
use had ever been made, except through plaintiff's at-
a short time before the institution of the suit. She
that he cruelly drove her from his home more than
n years before, and had never offered to receive her
cept conditionally, by a cold and heartless message
her by his attorney as aforesaid; that when she mar-
aintiff she was living with an old maiden aunt, Mary
, and, that before the marriage plaintiff promised her,
is old aunt, with whom she had lived, when her mother
live, and also since the mother's death, should
th them; that aunt was old, and would have been
unless she accompanied them; that plaintiff did take
nt with her to his own home, but in about eighteen
s thereafter drove her off; that defendant protested,

reminding him of his promise, but he drove them both from his home, and that they then went back to their former home, where they remained for nearly two years, when plaintiff moved them into a house on a place where he then lived, near his own house, at which she and her aunt lived. For a year before this last move, plaintiff visited her as her husband, coming and going as he pleased. She lived near his house, after being moved back, for about six years; during all this time she did his washing and mending, and in all things discharged her duty as a good and faithful wife. He came frequently to see her, staying sometimes for a day or two, and often remaining over night, they cohabiting as man and wife; she often went to his house, and did whatever work was necessary to be done.

He sold the place where they then lived, and bought another farm, to which farm said plaintiff himself moved respondent and her aunt. They lived in a house on this new farm, a few hundred yards from his own residence. At this place she remained, and was there when the answer was filed. At this place plaintiff and respondent cohabited as man and wife; plaintiff often staying with respondent in this house a week at a time, "and until recently, before instituting his suit against her, he has divided his time day and night between the house he calls his home, and the house, in which respondent lived."

A short time before the institution of this suit, and shortly after plaintiff's attorney had served on her a notice to come to the house, in which plaintiff lived, the plaintiff served notice on Miss Hunter to vacate the house, in which she and respondent lived. She further says, that she has just gone where he told her to go, and has done everything he desired her to do. She denies that he is entitled to the custody of the children. She asks in her answer by way of affirmative relief, a divorce from bed and board from complainant, with alimony, on the ground of desertion from her, and cruelty and neglect. But I am of opinion, that as the plaintiff denies these charges in his replication, and as they are not sustained by proof, it is necessary to set out the grounds more specifically, although evidence was taken, which will be hereafter commented upon.

On the 3d day of May, 1881, the court, upon the hearing, entered a decree dissolving the bonds of matrimony; leaving the children for the present in the custody of the defendant, reserving the right upon petition to make any further decree as to them, which might be necessary, and also reserving the right to the defendant to apply to the court, at any future time, for such relief as she might show herself entitled to; and each party was ordered to pay his and her own costs. From this decree the defendant appealed.

Loomis & Tavenner for appellant cite the following authorities: Code, ch. 64 § 5; 21 Gratt. 43; 22 Gratt. 168; 30 Gratt. 307; 1 Bishop Marr. and Div. (5th Ed.) §§ 775, 778; 4 Rand. 662; 4 H. & M. 507; 1 Bishop Marr. and Div. § 568; *Id.* §§ 569, 571, 787; 2 Bishop Marr. and Div. 350 *et seq.*

John A. Hutchinson for appellee cites the following authorities: 4 Paige 432; 32 Miss. 279; 19 Ill. 334; 27 Ind. 186; 25 Vt. 678; 1 Dev. (N. C.) Eq. 352; 4 Barb. 217; 6 Tex. 3; 7 Tex. 538; 100 Mass. 150; 34 Ark. 37; 52 Ind. 553; 44 Ala. 437; 41 Ga. 46; 27 Wis. 252; 73 Ill. 497; 31 N. J. Eq. 225; Mo. App. 572; 8 Oregon 224; 87 Ill. 250; 29 N. J. Eq. 96; 2 Bishop Marr. and Div. § 655 a; 1 Bishop Marr. and Div. § 773; *Id.* § 788 and notes; *Id.* § 754; 1 Bishop Marr. Women § 45; 1 Bishop Marr. and Div. § 786 and cases cited; 32 N. J. Eq. 231; 21 Gratt. 43 to 47; 30 Gratt. 307; 31 Gratt. 13; 103 Mass. 577; 2 Beas. (N. J.) 38; 4 Allen 39; 1 Hoff. 47; 2 Bishop Marr. and Div. § 672; 1 Bishop Marr. and Div. § 799; *Id.* § 810.

JOHNSON, PRESIDENT, announced the opinion of the Court:

This will be the first reported divorce case in this State. We would gladly wish, that it might be the last. The bonds of matrimony should never be dissolved unless for the most cogent legal reasons made clearly to appear to the court. Of course when such reasons do appear, painful as it is to pronounce a decree dissolving the marriage, the law must be enforced. One of the grounds for divorce from the bond of matrimony, as declared in our Code, chapter 64, section 5,

is, "where either party willfully abandons or deserts the other for three years."

That is desertion, for which a divorce will be granted if it is a breach of matrimonial duty, and is composed of the breaking of the matrimonial cohabitation, and secreted from the intent to desert in the mind of the offender; both of which must combine to make the desertion complete. *Bailey v. Bailey*, 21 Gratt. 43; *Latham v. Latham*, 30 Gratt. 307.

It is a question of some doubt from the depositions in this cause, whether the defendant in the first instance deserted the plaintiff, or whether the plaintiff drove her from his house and thus deserted her. The plaintiff and his two sons from a former marriage, in their depositions say, that the plaintiff ordered Miss Mary Hunter to leave the house, and that the defendant, against the protest of the plaintiff left with her. On the other hand the defendant and Miss Hunter are positive in their depositions, that plaintiff ordered Miss Hunter to leave, and when Mrs. Burk protested, a well-minded plaintiff of his promise, that Miss Hunter should remain with them, that he then ordered his wife to leave too. It is very evident from the evidence, that the plaintiff's desire to remove Miss Hunter, and his ordering her from his house was the whole cause of the trouble. It is shown to the satisfaction of my mind, that the plaintiff did promise his wife, before he married her, that her old aunt should have a home with them. No satisfactory reason is shown for plaintiff's refusal to this old lady, and if he had had any adequate reason for his wife's attachment to her old aunt, he would not have acted in this unseemly manner. In this act he certainly did not show any affection for his wife. But even this could not justify a desertion on the part of the wife. Her duty was to her husband, before her aunt. The weight of the evidence shows, that she did on that first occasion leave her husband. But even if she did not, the weight of the evidence shows, that in 1867 the plaintiff, through Robert Nourse and others, asked her in good faith to return, and she refused to do. If she had not deserted him before his desertion would have dated from that time. 1 Bishop's D. sec. 786 and cases cited; *Trall v. Trall*, 32 N. J. E. 100. The intent to desert being once shown, is presumed.

tinue until the contrary appears. *Bailey v. Bailey*, 21 Gratt. 43.

Is there anything in this record, which shows, that the intent to desert was abandoned? The conduct of the parties will have much influence in determining this question. Mrs. Burk swears, that in about a year after she left her husband's house, he visited her and they cohabited together as man and wife; and that in about two years thereafter, the plaintiff, Burk, came with his own teams and moved Mrs. Burk, her children and aunt Mary, and their household goods to a house within a few hundred yards of the house, in which plaintiff lived, where for a number of years they resided; Mr. Burk, visiting her as he pleased, staying with her at night as her husband, and resuming the matrimonial cohabitation. Mrs. Burk testifies, that he did not ask her to go into his house where he lived; he says he did.

It is very evident from the circumstances and the conduct of the parties, that this arrangement was a compromise between them; because the plaintiff would have been under no legal obligation to bring his wife back to his own premises, had she without cause deserted him, and persisted in such desertion. From this place when plaintiff had sold it, his wife uniting in the deed, he removed her and her children, and Miss Hunter to another place, which he had bought a few miles distant from where they lived, in a log house on said place, near his own residence. Again the plaintiff kept up his visits to his wife, staying with her at night as he wished, and cohabiting with her, and this state of things continued until the spring of 1880, when he sent the demand to her, through his counsel, that she should move into the house with him; and about the same time he sent a notice to the old lady, Miss Hunter, to vacate the premises. This terminated the arrangement to have her live away from his residence, even on his premises; an arrangement, which had evidently been made and adhered to for about ten years. This he had a right to do, and if his wife declined to go without a legal excuse, it would be desertion on her part from that time. When the husband changes his matrimonial home, the wife must go with him, and if she refuses without a legal excuse she deserts him. This demand was

made on the wife, a few months only before this suit was brought. It was the wife's duty to obey him, and to go into his own residence, and we do not see in the record a legal excuse for her not doing so. It is her duty now to offer in good faith to live with him, in the residence he has chosen, and if he refuses to receive her, from that moment it will be desertion in him. But the desertion to be ground of divorce from the bond of matrimony must *continue* three years. It must be a continuous, unbroken desertion. Two periods of desertion cannot be added together for the purpose of making up the term required by the statute. *Gaillard v. Gaillard*, 23 Miss. 152. Desertion cannot be inferred from the mere unaided fact, that the parties do not live together. *Jennings v. Jennings*, 2 Beasley 38.

The evidence in this case shows very clearly, that for more than ten years before the institution of this suit, the plaintiff had two residences on his premises, in one of which his children by his former wife lived, and in the other his wife and children; and the husband and father divided his time between the two. As before stated he had the right to break up this arrangement whenever he chose, and when he did, his wife must go with him to the other residence, or to whatever place he might make his home. But while the arrangement continued, is it not absurd to say, that there could under such circumstances be any desertion by the wife?

It has been held, that actual abandonment of matrimonial cohabitation, without reasonable cause, for the statutory period, intentional on the part of the wife, is cause for divorce, notwithstanding the fact, that she make occasional visits to the house of her husband to look after her children, and while there, engage in domestic duties, but while there occupied a different room from her husband. *Rie v. Rie*, 34 Ark. 37. In Kentucky it was held, the right of the wife to obtain a divorce, will not be impaired by an offer made by the husband a short time before the lapse of two years to make provision for her support, unless it is accompanied with an offer to receive and acknowledge her as his wife. 2 Litt. 338

In Massachusetts it was held, that proof that a husband

intentionally and against his wife's consent abandoned for five consecutive years all matrimonial intercourse and companionship with her, and denied her the protection of his home, will sustain her libel for divorce from the bond of matrimony, on the ground of desertion; and it is immaterial, that during that period he has regularly contributed money, and from time to time necessities towards supporting his wife and children. *Magrath v. Magrath*, 103 Mass. 577.

In *Yeatman v. Yeatman*, Law Rep. 1 P. & D. 491, the judge ordinary said: "A wife is entitled to her husband's society and the protection of his name and home, in cohabitation. The permanent denial of those rights may be aggravated by leaving her destitute, or mitigated by a liberal provision for her support; but if the cohabitation is put an end to, against the consent of the wife and without the intent of renewing it, the matrimonial offense of 'desertion' is in my judgment complete." It is also true, that although the husband gives his wife only a meager or no support, denies her much of his society, puts her in a house separate from his ordinary residence, because she refuses to live at his residence, and yet does not break off the matrimonial cohabitation, neither can be said to have deserted the other. As is said in *Latham v. Latham*, 30 Gratt., to constitute "desertion" within the meaning of the statute, there must be a combination of two things: an intention to desert, and an actual breaking off of the matrimonial cohabitation. The matrimonial cohabitation cannot be broken off by the mere fact of living in separate houses, while the husband constantly or at any time occupies the marriage-bed. If such a thing could for a moment be tolerated, then a man would have a legal warrant for the space of three years to make his wife his mere mistress, an act as shocking to the law as it is to morality and religion.

In an anonymous case 6 Mass. 147, Parsons C. J. said: "It would be injustice to the wife, and immoral in the husband to claim and enjoy as his peculiar marital rights, the society of his wife, after a knowledge of her offense, and afterwards to cast her off for that same offense."

This plaintiff occupies a very unenviable position as shown by the record. Within the greater part of the statutory

period of three years, prior to the institution of this suit, clearly and conclusively shown, that he continued to have intercourse with his wife; he admits it himself in his deposition, in which he says in answer to a question, "That from the time that she came there, or rather from about the time after she came back to the Ford farm, I tried to provide for her and the children; and at times I have eaten at her house, and for a while she gave her consent, that she would be with me at her own house, which invitation I accepted hoping that in the course of time, that she would come home and that we would live as man and wife. *Not quite a year ago she came and that should stop forever.*" Was the stopping of that proof of the cause of this suit? And did he hope to convince the court, that notwithstanding the fact, that matrimonial cohabitation had not been broken off one year, that he could not procure a divorce on the ground, that his wife had deserted him for *three* consecutive years? If he honestly claimed, that for *three* years before he brought this suit his wife was a deserter from his home, and that the time was running, which would give him a right to a divorce, and during that time he was cohabiting with her, from his stand point he was making her his mistress, nothing more. Could anything be more immoral than the wife or more immoral in such a husband?

There is a case, *Kennedy v. Kennedy*, 87 Ill. 250, in which it was held, that where a wife refused to go with her husband to a new home acquired by him, and without any justification deserted him for more than two years, the fact of the husband's cohabiting with her at her brother's house on one occasion within the two years, when she refused to go and live with him, did not have the effect to bar him of the right to a divorce. This is the only case so far as I know, in which such doctrine is held. We do not approve it; we think it wrong in principle, and dangerous to good morals in its tendency. There was never only one instance of cohabitation within two years. Here the cohabitation was continuous, for more than the three years required.

This record shows no legal ground for a divorce. The decree of the circuit court is reversed with costs to the appellant; and this Court proceeding to pronounce such de-

recruit court should have rendered, the plaintiff's bill is
 ssed with costs.

GES GREEN AND SNYDER CONCURRED.

FREE REVERSED. BILL DISMISSED.

WHEELING.

MERCHANTS NATIONAL BANK v. GOOD, ADM'R., *et als.*

Submitted June 8, 1882—Decided April 14, 1883.

(WOODS, JUDGE. Absent.)

judgment against the personal representative of an estate is not
 ven *prima facie* much less conclusive evidence against the
 devisee or heir of such estate; and the fact that the same per-
 son may be both personal representative and heir or devisee
 does not constitute an exception to the rule. (p. 461.)

a suit to subject real estate, conveyed by a debtor in his life-
 time without valuable consideration, to the payment of a simple
 contract debt, it is error for the court to take the amount of a
 judgment for such debt recovered against the administrator of
 such debtor as the foundation for its decree and to give interest
 on the amount of such judgment—said amount being for the
 principal and interest on the original debt at the date of said
 judgment. The decree in such case should be for the original
 debt with the interest aggregated thereon to the date of the
 decree, and then interest on such aggregate until paid. (p. 461.)

giving of a new note for an old one which had become due—
 the amount and makers of the two notes being the same—will
 not be treated as a payment or extinguishment of the old note
 for the pre-existing debt, unless the parties so *expressly agree* ;
 but it will be regarded merely as an extension of credit. (p. 463.)

such case the surrender of the old note will not of itself raise a
 presumption of such agreement to extinguish the old note by
 the giving of the new one, it being considered as a conditional
 surrender and that its obligation is restored and revived, if the
 new note is not paid. (p. 464.)

and the new note will not be regarded as a payment of the old,
 even when it is so expressly agreed, if such agreement was pro-
 cured by the concealment of any material fact affecting the
 security of the debt. (p. 465.)

will the presumption apply where the creditor, when he takes
 the new note, abandons some security which he holds. (p. 466.)

submitted before Judge W. took his seat on the bench.

21	455
34	676

21	455
37	563

21	455
40	204

21	455
41	449
41	509

21	455
45	498

21	455
47	206

21	455
48	701

21	455
50	108

21	455
57	415

21	455
62	461

21	455
64	276

21	455
66	163

7. Where one of two or more makers of a joint and several promissory note is surety, he is liable to the payee as principal; and, except in special cases provided by statute, the holder of such note has the same legal rights against such surety as he has against the principal maker. (487.)

Appeal from and *supersedes* to a decree of the circuit court of the county of Ohio, rendered on the 23d day of May, 1881, in a cause in said court then pending, wherein the Merchants National Bank of West Virginia was plaintiff, and J. Hanson Good, administrator, and others were defendants, allowed upon the petition of said Good.

Hon. Thayer Melvin, judge of the first judicial circuit, rendered the judgment appealed from.

SNYDER, JUDGE, furnishes the following statement of the case:

On the 14th day of October, 1872, and for many years prior thereto, Benoni S. Good was the owner in fee of valuable real estate in the county of Ohio, which he by deed dated on that day and recorded in said county on the day following conveyed to Robert B. Woods, trustee, without any valuable consideration, for the use of his wife Jane T. Good for life with remainder in fee to his son, J. Hanson Good; that on the said 14th day of October, 1872, and for several years before that time, Moses C. Good, Benoni S. Good and A. Bedillion were indebted to the Merchants National Bank of West Virginia, Wheeling, upon a joint and several note executed by them to said bank for one thousand four hundred dollars. The consideration for said debt was money borrowed by said Moses C. Good upon the note of himself with the said Benoni S. Good and A. Bedillion as his sureties thereon; that notes for said debt had been renewed every ninety days for the same sum and by the same parties from the date of the loan, the interest for the current ninety days having been paid at each renewal, until November 25, 1872, when it was finally renewed by giving the following note and paying the interest thereon till its maturity:

"\$1,400. Ninety days after date, we, or either of us, promise to pay to the Merchants National Bank of West

April, 1883.]

BANK v. GOOD.

457

Virginia (at Wheeling) fourteen hundred dollars, for value received. Witness our hands this 25th day of November, 1872.

“(Signed)

“M. C. Good,

“B. S. Good,

“A. BEDILLION.”

At each renewal the matured note was surrendered to said M. C. Good by the bank; that, on the 6th day of January, 1873, the said Benoni S. Good departed this life, and on the 12th day of April, 1873, his son, the said J. Hanson Good, duly qualified as his administrator; that no part of the said one thousand four hundred dollars having been paid, the said bank by an action on said note of November 25, 1872, recovered a judgment against said J. Hanson Good as administrator of said Benoni S. Good, deceased, in the municipal court of Wheeling, on May 29, 1874, for one thousand five hundred and eighty-nine dollars; and the said judgment remaining unpaid, the said bank on the 31st day of August, 1874, instituted this suit in the circuit court of Ohio county against said J. Hanson Good in his own right and as administrator of said Benoni S. Good, deceased, Jane T. Good and Robert B. Woods, trustee. The plaintiff, in its bill, avers the facts hereinbefore stated, and, also, that said deed of October 14, 1872, was made with intent to delay, hinder and defraud the plaintiff as a creditor of said Benoni S. Good, and, being without valuable consideration, is void as to the plaintiff's debt which had been contracted before the execution thereof; that the said real estate is of the value of twenty thousand dollars, and it was mainly on account of the ownership of said real estate that the notes for the debt aforesaid were renewed from time to time and credit given to said Benoni S. Good; and prays, that the said deed, as to the said debt of the plaintiff, be declared void and so much of the real estate therein conveyed as shall be necessary may be sold to pay said debt with interests and costs, and for general relief.

The defendant J. H. Good demurred to the plaintiff's bill, which demurrer was overruled by the court, and, subsequently, he in his own right and as administrator of said B. S. Good, deceased, and the defendant, Robert B. Woods trustee, filed their separate answers to said bill, and the

plaintiff replied generally thereto. The said J. H. Good in his answer avers, that said B. S. Good died without estate; that he is his administrator, and no assets have come into his hands. He admits the recovery of the plaintiff's judgment, but denies that said B. S. Good was indebted to the plaintiff on account of the note upon which said judgment was recovered prior to November 25, 1872, the date of said note, and he avers that all the series of notes mentioned in plaintiff's bill of date prior to the 25th of November, 1872, had been paid and surrendered by the plaintiff. He denies that said conveyance of October 14, 1872, was made with intent to delay, hinder and defraud the plaintiff or that the debt of plaintiff had been contracted at or before the date of said conveyance; and he, also, denies that it was the object of the real estate conveyed by said B. S. Good on which the plaintiff mainly relied for the security of its said debt. The answer of the said Robert B. Woods trustee, denies that he had any knowledge of any indebtedness by the said B. S. Good to plaintiff at the date of said conveyance to the plaintiff, and he denies that the real estate thereby conveyed came to be made liable for said debt, or that said conveyance was made with intent to delay, hinder and defraud the plaintiff or any one else.

The record shows that the respective parties admitted the following facts in the cause:

1. That Benoni S. Good was surety for M. C. Good on a note of November 25, 1872, and also on all other notes of the same date, which this was a renewal;
2. That when said note of November 25, 1872, was due, it was surrendered to the plaintiff in renewal of a note then due, the said note then due was surrendered to M. C. Good, and also that at the time of the renewal the old note was surrendered to M. C. Good;
3. That no personal notice was given by Benoni S. Good to the plaintiff nor any of the defendants to the plaintiff of the execution of the deed to R. B. Woods trustee;
4. That the consideration for said deed was the natural love and affection of Benoni S. Good for his wife and children, and
5. That at the time of the institution of this suit M. C. Good, and A. Bedillion, who with said Benoni S. Good,

and several makers of the notes and renewals in these proceedings named, had departed this life, having died insolvent; and that this suit may proceed without the presence of their respective personal representatives parties to the suit and be decided as though said personal representatives had been made and were parties duly served with process in these proceedings.

The admitted facts and the foregoing statement contain all the material facts presented by the record in this cause.

The defendant Jane T. Good having departed this life, the court substituted as to her, and on May 23, 1881, the said circuit court of the county entered a decree, finding that the defendant, J. Hanson Good, administrator of Benoni S. Good, deceased, is indebted to the plaintiff in the sum of one thousand five hundred and eighty-nine dollars, with interest thereon from May 1, 1874, until paid; that said indebtedness was contracted by said B. S. Good prior to the date of said conveyance of the premises on or about the 14th day of May, 1872, to Robert B. Woods trustee; that said conveyance was voluntary and is void as to the debt of plaintiff; the court, therefore, decreed that, unless said debt, costs and costs of this suit were paid in thirty days, a commissioner, therein named, should sell enough of said real estate so conveyed to pay the plaintiff's debt, &c. From this decree the defendant J. Hanson Good obtained from this court an appeal and *supersedeas*.

Robert White for appellant, J. H. Good, cited the following authorities: Code Va. (1849) ch. 58 § 16; Rev. Stat. U. S. § 53; Code, ch. 74 § 2; 5 Cush. 158; 13 Vt. 452; 6 Mass. 15; 15 Serg. & R. 162; 12 Mich. 425; 21 Wend. 450; 8 Vt. 522; 4 Wash. C. C. 271; 5 Whart. 530; Story Prom. (5th ed.) § 105; 4 Mass. 336; 2 Vt. 287; 4 Vt. 549; 4 Vt. 444; 2 Metc. (Mass.) 157; 12 W. Va. 772; *Id.* 784; 1 Vt. 63; 2 Cliff. 130; 3 Serg. & R. 276; 4 Watts & S. 100; 1 Vt. 318; 34 Mo. 485; 26 Coms. 481; 2 Gratt. 374; 12 W. Va. 37; 11 Johns. 409; 23 Vt. 561; 8 Vt. 151; 2 McL. 594; 1 Vt. 253; 26 Conn. 481; 21 Conn. 200; 27 *Id.* 47; 5 Vt. 126; 34 Mo. 485; 4 Wall. C. C. 271; 2 B. & A. 210; 1 Gratt. 1; 17 W. Va. 574, 575; 6 Humph. 85; 10 Yerg. 3; J. J. Marsh. 195; 1 La. 527; 5 Dal. 329; 2 Pars. 203;

10 Wheat. 340; 10 Serg. & R. 75; 11 R. I. 619; 23 Vt. 561; 8 Cow. 77; 8 T. R. 515; 2 Comp. & J. 405; 3 M. & S. 362; 45 Barb. 476; 4 J. J. Marsh. 1; 2 Gill. & J. 493; 10 Md. 27; 20 Md. 248; 1 Ired. 262; 47 Barb. 29; 2 Gill. 707; 27 Ala. 254; 5 Whart. 530; 4 Watts & S. 100; 19 Pa. 318; 34 Mo. 485; 4 Man. G. & S. 272; 8 Vt. 561; 15 Johns. 247; 32 Barb. 296; 1 Hill 516; 3 W. Va. 622; 3 Call 204; 2 Cas. & Paine 20; 4 Esp. 158; Brandt Suretyship § 79; *Id.* § 2; 35 Mich. 42; 21 How. 66; 1 Fla. 327; 6 Ill. 581; 31 Me. 188; 10 Mo. 559; 10 Johns. 180; 31 Barb. 297; 23 Vt. 561; 2 Gill. & J. 493; 10 Md. 27; 20 Md. 248; Code p. 631 § 2; 4 Min. Inst. part II. p. 908; 22 Gratt. 573; 7 Watts 163; 2 B. Mon. 254; 1 Johns. Chy. 354; 2 McL. 59; 20 Ia. 943; 40 Vt. 219; 1 Blackf. 310; 5 Blackf. 129; 10 Serg. & R. 144; 35 Ia. 543; 25 Cal. 545; 8 Cow. 437; 16 Johns. 152; 6 Wend. 613; 2 Pars. Bills 203; 26 Ga. 426; 34 Mo. 547; 42 Me. 549; 4 N. H. 221; 30 Ga. 306; 25 Ia. 221; 12 Ia. 55; 45 Me. 183; 30 Vt. 148; 1 Freeman Chy. 548; 23 Ga. 368; 13 Ia. 289; 19 La. 453; 26 Ill. 469; 1 Stew. 11; 15 La. An. 522; 27 Ill. 323; 9 Ala. 949; 31 Ill. 258; 55 Ga. 656; 16 Wis. 666; 53 Mo. 153; 49 Ga. 309; 55 Mo. 31; 28 Me. 280; 7 El. & Bl. 431; 2 El. & El. 424; 2 Mete. (Ky.) 247; 17 Conn. 97; 11 Md. 285; 5 Kan. 483; 6 Ga. 44; 46 Ill. 428; 3 Tex. 215; 5 W. Va. 140; 10 W. Va. 470.

A. J. Clarke for appellee cited the following authorities: Code, ch. 131 § 18; Freeman Jdgmts. § 163; Reporter, May 3, 1882, p. 572; 4 Leigh 88; 21 Gratt. 556; 26 Gratt. 638; 13 W. Va. 426; 2 Dan. Neg. Inst. § 1266; Story Prom. Notes §§ 104, 404, 438; 29 Gratt. 225; 11 R. I. 609, 618; 7 How. 220; 17 Curtis 97; 10 W. Va. 87, 95; Code, ch. 74 § 2; 10 W. Va. 321; 3 Call 234; 26 Gratt. 638; 21 Gratt. 567; 13 W. Va. 426; 5 Wend. 490; 23 Cal. 322; Edwds. Bills 200; 2 Pars. N. & B. 205, 219; 2 Dan. Neg. Inst. § 1272; 15 Serg. & R. 162; 29 Gratt. 226; 9 W. Va. 73, 76, 77; 10 W. Va. 662; 8 W. Va. 549; 21 Gratt. 556; Lead. Cas. Bills & Prom. Notes 642; Thompson's Nat'l Bk. Cas. 883, 890; 7 How. 220; Rev. Stat. U. S. §§ 5133, 5136; 20 Minn. 204; Thomp. Nat'l Bk. Cas. 935; 94 U. S. 673.

SNYDER, JUDGE, announced the opinion of the Court:

The first error complained of, is that the circuit court improperly overruled the demurrer to plaintiff's bill. This objection seems to be founded on the averment of the bill, that the plaintiff's judgment against the administrator of B. S. Good is a *lien* on the real estate therein mentioned, and the prayer asking that said *lien* may be enforced. It is true the bill does so state, but it, also, avers that the said B. S. Good was long prior to the date of the deed conveying said real estate indebted to the plaintiff by note for one thousand four hundred dollars, which note by renewals from time to time continued said indebtedness until the said note of November 25, 1872, was given as the final renewal for said debt. And in addition to the prayer for specific relief, the bill contains a prayer for general relief. The plaintiff's judgment against the administrator was certainly not a lien on the said real estate, nor was it even *prima facie* evidence of any indebtedness against the grantee and beneficiaries in said deed. If, therefore, the bill had not contained other sufficient averments and a prayer for general relief, the demurrer should have been sustained. But, if the objectionable portions of the bill are excluded as surplusage, the remaining averments and prayer are still sufficient to entitle the plaintiff to relief, and the demurrer was therefore properly overruled. *Beall v. Silvey*, 2 Rand. 401; *Cook v. Mancius*, 5 Johns. Ch. 99.

The second and third assignments of error present the question, first, whether or not a judgment against an administrator is conclusive or even *prima facie* evidence against the devisee or heir of the real estate, the administrator against whom the judgment was recovered being also the heir or devisee; and, second, if not, then is the decree in this cause, which takes the amount of the judgment against the administrator as the foundation of the plaintiff's claim and gives interest thereon from the date of such judgment warranted by the law of this State?

Freeman on Judgments § 163, after announcing the general rule that proceedings against the executor or administrator of an estate do not preclude a defense on original grounds by the devisee or heir of such estate, states that cases in which the executor or administrator and the devisee or heir are the same person are exceptions to the rule. "For

though in this case," says this author, "the party claims in two capacities, a judgment against him in one capacity is also conclusive against him in the other. He represents the interests of one and the same person; and has full opportunity, in a suit against himself as personal representative, to protect his rights as successor to the realty." In support of this doctrine, two cases only are cited, the one from Pennsylvania, *Stewart v. Montgomery*, 23 Pa. St. 410, and the other from Alabama, *Boykin v. Cook*, 61 Ala. 473. Upon an examination of these cases I find that they grow out of the statute laws of those States and have no application where such statutes do not exist. The general doctrine, without qualification or exception is well settled in Virginia and in this State, that "there being no privity between the personal representative and the party to whom the real estate passes, a judgment against such personal representative is not even *prima facie* evidence against the heir or devisee." *Laidley v. Kline*, 8 W. Va. 218; *Custer v. Custer*, 17 *Id.* 113; *Mason v. Peters*, 1 Munf. 437; *Foster v. Crenshaw*, 3 Munf. 520; *Shields v. Anderson*, 3 Leigh 736. In *Brown v. Lawson*, 76 Va. R., the questions here presented was not passed upon, but the court in that case, after referring to the rule laid down by Freeman, says: "The inconvenience and apparent hardship of the rule, as it is understood in Virginia, may generally be obviated. In most cases, certainly in cases of liquidated demands and when there is a known deficiency of personal estate, the creditor need not proceed against the personal representative separately in the first instance, but may bring him and his heirs or devisees before the court in the same suit in equity, and thus avoid the hazard, delay and expense of a repeated litigation of the same matter." This is the usual course in this State, and I see no reason or necessity for making the mere fact, often accidental, that the heir or devisee may, instead of a legatee or stranger, become the executor or administrator of an estate, the basis of changing the rule and making the judgment conclusive in the one case while it is not even *prima facie* evidence in the other. My conclusion, therefore, is that by the law and policy of this State a judgment against the personal representative of an estate is not even *prima facie* much less conclusive

evidence against the devisee or heir of such estate, and the fact the same person may be both personal representative and heir or devisee does not constitute an exception to the rule. The said judgment against J. Hanson Good as administrator being not even *prima facie* evidence against him as grantee of the real estate, it follows of necessity, that said judgment is not evidence of any debt for which the real estate in the bill can be charged. The plaintiff's right to subject said real estate can arise alone out of the debt for which the note of November 25, 1872, was given. The said judgment in this suit must be entirely discarded. And said note, which the plaintiff concedes, represents the whole of said debt which remains unpaid, having become due on the 23d day of February, 1873, the plaintiff could only recover, the amount of said note one thousand four hundred dollars with interest thereon from February 23, 1873, to May 23, 1881, the date of the decree. And according to our statute—sec. 16 ch. 131 of the Code—the decree should have been for the aggregate of principal and interest to the latter date, May 23, 1881, with interest thereon till paid. But instead of so ordering the court gave a decree for one thousand five hundred and eighty-nine dollars the amount of said judgment with interest thereon from May 29, 1874, till paid. This was manifest error, and this error being to the prejudice of the appellant in a sum exceeding one hundred dollars, it being according to an estimate made by me one hundred and sixty-one dollars and eighty cents, the said decree must be reversed therefor.

We come now to the material question in this cause raised by the fourth and last assignment of error. It is insisted by the appellant that, Benoni S. Good, being simply a surety, the pre-existing debt of the plaintiff, as to him, was extinguished when the note of November 25, 1872, was given, discounted by the plaintiff and the precedent note surrendered to M. C. Good; and that the said note of November 25, 1872, being, as to said B. S. Good, the creation of a new debt, contracted after the conveyance of October 14, 1872, had been executed and recorded, the validity of said conveyance, although voluntary, cannot be questioned on account of said debt, so subsequently created.

In support of this position attention is called to the established equity rule, that "Sureties are never held liable beyond the clear and absolute terms and meaning of their undertakings, and presumptions and equities are not allowed to enlarge or in any degree to change their obligations." The soundness of this rule will not be questioned; but the difficulty is to determine the character and extent of the undertaking and legal obligation of the defendant B. S. Good in respect to the plaintiff's debt in this case. It must be conceded that, at the time said conveyance was made on October 14, 1872, said B. S. Good was liable to the plaintiff for a debt of one thousand four hundred dollars upon a positive contract—a note for that sum, signed by him, and that said debt has not been paid or discharged since the giving of the note of November 25, 1872, by the defendant parties for the same amount and the acceptance of that note by receiving the discount thereon for ninety days and the surrender of the precedent note by the plaintiff to M. C. Good constitutes a legal payment or discharge of said debt. This transaction pay the old and create a new debt?

We shall first enquire what the legal effect of giving a new note and surrendering the previous one was upon the liability of Good the principal debtor.

In *Porter v. Talcott*, 1 Cow. 380, it is stated that, "it is well settled, that a note given by the debtor for a pre-existent debt, is no payment of the original demand, unless expressly agreed to receive it in payment." The following cases hold the same doctrine: *Tobey v. Barbor*, 5 John. 72; *Darbling v. Loos*, 45 Mo. 150; *Sutliff v. Atwood*, 1 La. St. 186; *Lear v. Friedlander*, 45 Miss. 559; *Ins. Co. v. St. Louis*, 6 Har. & J. 166; *Cole v. Sackett*, 1 Hill 516; *Eastman v. Porter*, 14 Wis. 39.

"To give to the acceptance of a note the effect of an absolute payment, or extinguishment of a debt, a contract, to that effect, should be so, must be shown"—*Glenn v. Smith*, 2 Gilman 493.

In *Kibbey v. Jones*, 7 Bush. 243, it was held that, "the renewal of a note executed before June, 1866, so as to include with it another debt created after that date, did not constitute as a payment of the first note, but only as a renewal

obligation to pay. The homestead was subject to that part of the aggregate note which was a renewal of the note executed before the homestead exemption act took effect."

Some of the Virginia cases hold, that, in order to make one instrument given by the same parties an extinguishment of another, the one so given must be of a higher dignity than the former; and, therefore, even when it is agreed that the new note shall be an extinguishment of the old, such an agreement is a *nudum pactum*, and will, if the new note is not paid, not operate as an extinguishment of the old—*McGuire v. Gadsby*, 3 Call 234; *Herrington v. Hawkins*, 1 Rob. 391; *Parker v. Cousins*, 2 Gratt. 373. But whether this be the correct doctrine or not, it is well settled in both Virginia and this State, that a note will not be regarded as an absolute extinguishment or payment of a precedent note or pre-existing debt, *unless it be so expressly agreed*—whether the note received was that of one previously bound, or of a stranger; and it will not be so regarded, even when *so expressly received*, if such agreement was procured by fraudulent concealments and representations—*Poole v. Rice*, 9 W. Va. 73; *Lazier v. Nevin*, 3 *Id.* 627-8; *Miller v. Miller*, 8 *Id.* 550; *Dunlap v. Shanklin*, 10 *Id.* 662; *Feamster v. Withrow*, 12 *Id.* 611; *Bantz v. Basnett*, 12 *Id.* 772; *Sayre v. King*, 17 *Id.* 562; *Farmers' Bank v. Mutual Asso. So.*, 4 Leigh 88; *Moses v. Trice*, 21 Gratt. 556; *Tardy v. Boyd*, 26 *Id.* 638; *Lewis v. Davis*, 29 *Id.* 225.

In *Farmers' Bank v. Mutual Association Society*, *supra*, the court says: "Equity looks to the substance, not to the forms of things. Equity sees that when a dealer at bank pays off a note by renewal, the debt is the same; *the debt remains unpaid*, and the credit only is extended." 4 Leigh 88.

In *Bantz & Co. v. Basnett*, *supra*, it was held by the whole court, that the payment of a part of a note *before* it became due and the giving of a new note for the residue by the debtor with an *express agreement* that the old note shall be surrendered, such agreement being founded upon a valuable consideration, extinguished the old note. But whether, after the old note *had become due*, such payment, new note and *express agreement* would have extinguished the old note, was the question upon which the Court divided—Johnson J.

holding that such agreement, being without consideration, would not extinguish the old note, and Moore and Greaves holding that whether it would or would not extinguish the old note was a question of fact for the jury under all the circumstances. The position of none of the judges in these questions the doctrine before stated, that a new note given by the same parties will not extinguish a precedent note unless it is so expressly agreed between the parties.

"The delivery or surrender to the maker of the old note upon its being renewed, does not in itself raise a presumption of its extinguishment by the new, it being considered as a conditional surrender, and that its obligation is not renewed and revived if the new note be not paid, and the same rule applies when the new note has been carried to judgment but without satisfaction." 2 Dan. on Nego. Inst. § 1266 and cases cited.

In Parsons on Notes & B., vol. 2 p. 203, it is stated that "The renewal of bills and notes presents the question of payment in a different light. Whatever may be the law as to regard to payment and satisfaction of a pre-existing bill or note, the general custom and understanding of the mercantile world *would seem to demand* that a new note should be given in renewal of an old one which is taken up, as it is the duty of the holder to should pay and cancel the old note for which it is substituted. This is a mere opinion of Prof. Parsons, as he cites no authority to sustain it. This position is expressly repudiated by 2 Dan. on Neg. Inst. § 1266 a, and in *Nightingale v. The Bank of England*, 11 R. I. 618.

Without further citation of authorities, I think it can be safely concluded from those which have preceded, that the giving of a new note for an old one which had been paid, due, the amount and makers of the two notes being the same, will not be treated as a payment or extinguishment of the old note or pre-existing debt, unless the parties so expressly agree; but will be regarded merely as an extension of time upon the debt; and the surrender of the old note will not itself raise a presumption of such agreement to extinguish the old note by the new one, it being considered as a conditional surrender and that its obligation is restored and revived, if the new note is not paid. And the new note

regarded as a payment of the old even when it is so
ly agreed, if such agreement was obtained by the con-
nt of any material fact affecting the security of the
nor does the presumption of any payment apply where
ditor abandons some security which he held when he
he new note. 2 Dan. on Neg. Inst. § 1267.

s the surety on a joint and several non-negotiable note,
s the note in this case, occupy a relation to the payee
ditor different from that of his principal? And can he
any defense to the debt evidenced by such note which
not be made by the principal, except defenses, which
ut of statutory provisions such as giving notice to the
or to sue after the note has become due, &c.?

Dan. on Neg. Inst. § 348, it is stated that, "Where one
or more joint and several makers of a promissory note
o his signiture the word *surety*, being such in fact, he
es liable thereon, to the payee or holder, as a maker of
te. The signers are liable to the holder as principals."
on v. Lyle, 10 Barb. 515; *Sisson v. Barrett*, 6 Id. 199;
Comst. 406; *McLaughlin v. Bank of Potomac*, 7 How.

the authorities so far as I have been able to discover,
t in special cases and statutory limitations which have
lication here, hold the doctrine that the holder of a
as the same legal rights against the surety that he has
st the principal maker. And this doctrine evidently
eds upon the most natural interpretation of the contract.
Allen, 19 Conn. 101; *Davis v. Huggins*, 3 N. H. 231;
Barker, 4 Pick. 382; *Croughton v. Duval*, 3 Call 69;
v. Prout, 3 Wheat. 524; *Pugh v. Cameron*, 11 W. Va.
I have been unable to find any authorities to sustain
stinction attempted to be made by the counsel for the
ant.

, however, claimed by the appellant that, under section
chapter 58 of the Code of Virginia, a bank could not
money for a period exceeding six months, and that
ore the courts will presume the bank has not violated
v by loaning for a longer period. Without stopping to
re, whether or not any such law is now in force in this
or if so, whether it applies to a National bank such as

the plaintiff, I am satisfied that the law is not amenable to such an interpretation as that contended for by the plaintiff. The object of this statute was to prevent banks from exacting interest in advance for a period in excess of twelve months, but it was not intended to deny them the right to renew notes from time to time and thus continue their business indefinitely.

Applying the foregoing principles to the case before us, the result is obvious. On the 14th day of October, 1871, Benoni S. Good was, as surety for M. C. Good, indebted to the plaintiff for a sum equal to the debt here sued for. At that time he had real estate worth twenty thousand dollars, and so far as this record shows that was all the property he had, and it does not appear that the principal in the debt, or the other surety had any property whatever. On the 14th day of October, aforesaid Benoni S. Good, by a voluntary deed, conveyed the whole of said real estate; and after such conveyance, on the 25th day of November, 1872, without disclosing the fact of such conveyance to the bank, his creditor, he and the other debtors executed and delivered to the bank a new note for the same amount and took up the old one, paying the interest on the former for ninety days to come. If said Benoni S. Good by this transaction intended to escape liability for the debt, it was actual fraud on his part, and if he did not so intend, as I infer he did not, then he intended still to be liable for the debt; consequently, in either event, he was not discharged from liability, and it is equally clear that, said debt not having been paid, the said voluntary conveyance could not prevent the real estate therein conveyed from being liable for the said debt—*Hunters v. Waite*, 3 Grant 100; *Lockhard & Ireland v. Beckley*, 10 W. Va. 87. But, holding that this may be, the giving of the note of November 25, 1872, did not, as we have seen, operate as a payment of the existing debt, there being no *express agreement* that the note should be received by the plaintiff as such payment, and therefore, the said Benoni S. Good, being indebted to the plaintiff for the debt here sued on at the time he made said voluntary conveyance of October 14, 1871, the real estate thereby conveyed is bound for the payment of the said debt, and the circuit court did not err in so holding.

for the error, hereinbefore pointed out, the said decree circuit court of Ohio county, entered on the 23d day y, 1881, must be reversed and annulled with costs to appellant against the appellee, the Merchants National of West Virginia at Wheeling; and this cause is re- d to said circuit court with directions to said court to uch further proceedings in the cause as may be neces- o carry into effect the principles settled by this opinion rther according to the rules and practice of courts of

nson, President, concurred in the foregoing opinion llabus, except so far as it is held by implication, that ring of a new note after maturity of the old note by same s for the same amount extinguishes the old note and where it is expressly agreed that such shall be the Such an agreement is without consideration and a nudum pactum. *Bantz v. Basnett*, 12 W. Va. 782.

GE GREEN CONCURRED WITH SNYDER, J.
REE REVERSED. CAUSE REMANDED.

WHEELING.

PUSEY *et ux.* v. GARDNER *et al.*

Submitted July 8, 1882—Decided April 14, 1883.

(*WOODS, JUDGE, Absent.)

party obtains a deed for land without consideration upon a rol agreement, that he will hold the land in trust for the antor, such trust will not be enforced, as it would violate the tute of frauds and the general rule of law, that parol evidence nnot be admitted to vary, add to or contradict a written con- act. (p. 474.)

burden of charging as well as proving fraud, mistake or mis- resentation is on the party alleging it; and a plaintiff is no ore entitled to recover without sufficient averments in his bill,

ubmitted before Judge W. took his seat on the bench,

21	469
34	289
34	630
21	469
35	523
36	55
21	469
37	501
37	577
21	469
39	122
39	506
21	469
40	41
21	469
41	274
41	335
21	469
42	13
42	311
42	781
21	469
43	153
21	469
47	222
47	225
47	785
21	469
48	348
21	469
50	358
21	469
54	617
21	469
56	332
56	487
21	469

21	469
62	605

21	469
65	128
65	579

than he is without proof of his averments when properly
The one is as essential as the other, and both must co-
relief can not be granted. (p. 476.)

3. It is a settled principle of law and sound policy, that a pa-
not be permitted to disavow or avoid the operation of an
ment entered into with a full knowledge of the facts,
ground of ignorance of the legal consequences which flow
these facts. (p. 476.)
4. A conveyance from a child to its parent, whether with or w-
a valuable consideration, is presumed to be valid in the
of any circumstances or proof tending to show fraud, m-
sentation or undue influence or reasonable grounds, from
the court may presume that the act was not entirely f-
voluntary on the part of the child. (p. 477.)
5. A conveyance made by a woman immediately before her m-
is *prima facie* good, and can be impeached only by p-
fraud. (p. 485.)
6. Even where there is no absolute bar from the lapse of time
the statute of limitations, it is a principle of courts of equ-
to take cognizance of an equitable claim after a great l-
time, and where from the death of parties and witnesses
is danger of doing injustice, and there can no longer b-
determination of the controversy. A court of equity th-
will not set aside a deed made by a daughter to her
immediately before her marriage conveying her remain-
land, in which the father had a life estate, upon the gr-
undue influence after an interval of thirty-five years an-
the death of the father, though the claim of the daughter
barred by the statute of limitations, where the case is no-
one, and there are no circumstances which sufficiently
for the delay. (p. 484.)
7. Lapse of time, when it does not operate as a positive statute
operates in equity as an evidence of assent, acquiesc-
waiver. (p. 481.)

Appeal from and *supersedeas* to a decree of the circuit
of the county of Hancock, rendered on the 27th day of
1881, in a cause in said court then pending, wherein
liam C. Pusey and wife were plaintiffs, and John H.
ner and others were defendants, allowed upon the peti-
said defendants.

Hon. George E. Boyd, judge of the first judicial c-
rendered the decree appealed from.

The facts of the case are stated in the opinion of the Court.

Encinq, Melvin & Riley for the appellants cited the following authorities: 15 W. Va. 567; 57 Mo. 73; 10 W. Va. 718; 11 W. Va. 229; 12 Pet. 253; 8 How. 183; 11 Law Rep. N. S. 531 (3 Abb. Nat. Dig. 372); 3 B. Mon. 76; 17 Ohio St. 485; Hill Trust. 157; Perry Trusts § 201; 1 Sto. Eq. § 309; 2 Lom. Dig. 301, 302; 2 Min. Inst. 597; 31 Barb. 9; 2 Leigh 11; 22 Ohio St. 329; 6 N. Y. 268; 73 N. Y. 499; 11 W. Va. 455; 1 Sto. Eq. § 84 a; 30 Gratt. 576; 32 Gratt. 411.

John A. Campbell for appellant cited the following authorities: 9 W. Va. 636; 7 W. Va. 289; 18 Gratt. 705; *Id.* 106; 1 Johns. Chy. 425; 13 Mass. 443; 23 Gratt. 589; 2 Sto. Eq. Juris. § 961; 26 Gratt. 392; 1 W. & T. Lead. Cas., Part I., p. 354; 1 Greenl. Ev. § 200; 15 W. Va. 582; 22 Gratt. 589; 26 Gratt. 392; 25 Gratt. 373; 23 Gratt. 585; 4 Otto 811; 18 Wall. 509; 1 Sto. Eq. Juris. § 64 a; 9 Pet. 404; 8 W. Va. 442; 1 Rob. 161; 6 Gratt. 405; 20 Gratt. 553; 29 Gratt. 762; 18 Wall. 78; Law Rep. 7 Chy. App. 329; 12 Pet. 224; *Brown v. Carter*, 5 Ves.; 12 Ves. 376; 1 J. & W. 58; *Richards v. Williams*, 7 Wheat.; *Hughes v. Edwards*, 9 Wheat.; 7 Gratt. 112; 19 Gratt. 300; 23 Gratt. 223; 2 Lom. Exrs. 488; 2 Perry Trusts, 860, 869; 30 Gratt. 577; 17 Ves. 289; 10 Gratt. 304; 1 Leigh 457; 23 Gratt. 223; 11 Gratt. 505; 4 Rand. 397; 1 Bishop Married Women § 706; *Id.* § 697.

Daniel Lamb for appellees cited the following authorities: Kerr Fraud and Mistake 192; Dowry 310 (21 E. Chy. R. 121 note); 2 Atk. 254; 32 Gratt. 608, 609; Kerr Fraud and Mistake 150-153; *Id.* 179; 2 Lead. Cas. Eq. (4th Am. Ed.) Part II, pp. 1176, 1177; 7 Beav. (29 E. Chy. R.) 551, 560; 15 Beav. 278 (11 E. L. & Eq. 134, 138, 139); Law Rep. 7 Chy. App. 329, 338, 339; 8 How. 183; 31 Barb. 9; 2 Leigh 11; 6 N. Y. 268, 272 *et seq.*; 73 N. Y. 498, 502, 503; 10 Hare 260, 262 (44 E. Chy. R.) 252, 254, 255; Law Rep. 1 Chy. App. 252; 32 Ohio St. 329; 15 Sim. 437 (38 E. Chy. R.); 66 N. Y. 37; 6 Cush. 472; 2 Ohio St. 209; 24 Conn. 230; 1 Wash. Real Prop. 583, 584; 30 Gratt. 578; 32 Gratt.

416; 2 Wash. C. C. 397; 2 Lead. Cas. Eq. (4th Ed.) P. p. 1205; 25 Gratt. 28, 40 *et seq*; 14 Rep. 220; 33 Gratt. Perry Trusts § 860.

SNYDER, JUDGE, announced the opinion of the Court.

Josias Reeves died intestate, in June, 1832, leaving a daughter, Eliza the wife of John Gardner, and three children to whom his real estate descended. In September, 1832, the said daughter, Eliza, died leaving, as her husband, five children to whom her share of the real estate derived from her father descended subject to the life estate of her husband, John Gardner, as tenant by the courtesy. By a decree, entered on the 10th day of October, 1833, in a suit brought to partition the real estate of said Josias Reeves among his heirs, a tract of four hundred acres called "the County Farm," in what is now Hancock county, Ohio, some houses and lots in the town of Wellsburg, was devised to the five children of said Eliza, subject to the joint life estate of said John Gardner therein. The said farm was valued at said partition at four thousand eight hundred dollars and the said houses and lots in Wellsburg at one thousand five hundred and thirty-eight dollars and twenty-five cents. Two of the said children of Eliza Gardner died soon after the partition at the ages of seven and five years respectively, leaving but three as the joint owners of the said farm and houses and lots, viz: Rachel Ann Gardner, Reason R. Gardner and John R. Gardner. The said Josias R. died intestate, in 1869, leaving as his heirs nine children, five of whom are infants and a widow—all of said children are still living except one who is an adult. The said Reason R. died testate, in August, 1871. By his will he devised his one-third of said farm to his son and only infant son.

The said Rachel Ann by deed, dated May 17, 1844, which was acknowledged on the 22d and duly recorded on the 23d day of May, 1844, conveyed to her father, John Gardner, with covenant of general warranty, all her share, right, title and interest in and to said "Up the County Farm" consisting of four hundred acres of land on the Ohio river. The deed, in its terms, conveys an absolute fee in the undivided one-third of said farm "for and in consideration of the sum of one

six hundred dollars by the said John Gardner to the Rachel Ann Gardner in hand paid, the receipt of which she acknowledged," &c. The said Rachel Ann was twenty-three years of age at the time said deed was made and was then living with her father and had been from her

On the 29th day of May, 1844, she was married to C. Pusey and lived with her father thereafter until, per-
1846 when she and her husband moved to Wellsville and resided there about six years; they then moved back into the house built for them by her father on the said "Up the City Farm" and have continued to reside there ever since. The said John Gardner took possession of said farm in 1833, and upon it about 1841, and resided on it from that time, and taking the rents, issues and profits thereof, until death which occurred May 23, 1878.

C. Pusey and the said Rachel Ann his wife, instituted suit, in January, 1879, in the circuit court of Hancock County against the widow and children of said Josias R. Gardner, deceased, and the devisees of said Reason R. Gardner, deceased, for the purpose of setting aside and declaring the said deed, dated May 17, 1844, from the plaintiff Rachel Ann to her father, John Gardner, on the ground that it had been obtained by mistake, fraud and misrepresentation without consideration, and also to have the said "Up the City Farm" partitioned among the parties entitled thereto according to their respective rights. The infant defendants by their guardian *ad litem* and the adult heirs and widow of Josias R. Gardner, deceased, filed their respective answers to the plaintiffs' bill, depositions were taken by the plaintiffs, the cause, having been regularly set for hearing, came to be heard, and on July 27, 1881, a decree was entered in setting aside, canceling, and annulling the said deed of May 17, 1844, from the plaintiff Rachel Ann to her father, for the one third of said farm, described in said deed, and declaring, that she was also entitled to the one third of the rents, issues and profits of said farm since the death of her father on May 23, 1878, and referring the cause to a commissioner to ascertain and report said rents, issues and profits, &c. From this decree the adult defendants have appealed to this Court.

The said decree is silent as to the grounds upon which said deed of May 17, 1844, was set aside and annulled; but it sufficiently appears from the briefs of counsel filed in this Court that the grounds relied on by the appellees to sustain the said decree are:

First—That the said deed was executed without consideration and upon an express parol agreement that the property should be held by the grantee, John Gardner, “in trust for the use and benefit” of the grantor, the said Rachel Ann;

Second—That it was obtained by mistake, misrepresentation and fraud, and by the undue influence of the grantee therein; and

• *Third*—That it was executed with the intent on the part of the grantor and grantee to defraud the plaintiff, W. C. Pusey, the intended husband of the grantor and is, therefore, void as to him.

1. As to the facts upon which the first ground is based, the plaintiffs’ bill, after stating the title of the plaintiff, Rachel Ann, to the fee in one third of said farm, avers: “That when your oratrix was in the twenty-third year of her age, she was engaged to be married to your orator, who was almost a stranger to her said father, and was married to him on the 29th day of May, 1844; that a few days before the said marriage her father, who knew she was about to be married to said W. C. Pusey, came to your oratrix with a paper writing or deed which he requested her to sign and acknowledge, as he alleged, for her own safety and benefit, her said father telling her that it was a conveyance to him of her interest in the said “Up the County Farm” in trust for her use and benefit, he alleging he would take care of it and keep her and her said intended husband from wasting and spending it, as they were young and inexperienced, and that this was his sole purpose for asking her to make said conveyance; she, relying on the father’s said statements, accordingly consented to and did sign and acknowledge the said deed on the 17th day of May, 1844, conveying, as she supposed, her one third interest in said farm to her father in trust for her own use and benefit.”

In *Troll v. Carter*, 15 W. Va. 567, this Court, after stating the general rule that parol evidence cannot be admitted to

add to or contradict a written contract, and especially a deed or deed conveying land, held: "If a party obtains land without any consideration upon a parol agreement he will hold the land in trust for the grantor, such trust shall not be enforced, as it would violate the statute of frauds and his general rule, to permit parol evidence to establish a trust." This decision was affirmed in *Zane v. Fink*, 10 Va. 755.

A deed to have any effect must of necessity divest the title of the grantor in the thing conveyed and vest it in the grantee. If parol evidence can be received to prove that the grantee agreed to hold the property for the grantor's use, such evidence will in effect be received to prove that it was intended to operate as a grant, but as a merely nominal transfer of the legal title which the grantor may recall at the next instant. To permit such evidence in such case would be clearly to allow the contradiction of a solemn deed by parol evidence. In a court of equity the usee is regarded as the real owner, and unless restrained by the terms of the deed he may at any time compel the conveyance of the legal title to him. I am, therefore, of opinion that the plaintiffs cannot prove an express trust in favor of the female plaintiff by parol testimony and, as none other was offered, the deed of May 17, 1844, could not be set aside on that ground.

In support of said second ground the plaintiffs alleged in their bill that the female plaintiff did not read said deed when it was read, at the time she executed it, "nor did she know its contents until after her father's death and this because of her unlimited confidence in the good faith and honesty of her father, but on examination of said deed she is surprised to find that the same on its face is a grant of her entire interest in said farm to her father and the consideration of said grant appears from said deed is one thousand six hundred dollars and she alleges that she did not at any time, before or after the execution of said deed ever receive the said sum of one thousand six hundred dollars, or any part thereof; that on the date of said deed she had just attained her majority and did not know the difference between an absolute grant and a grant in trust, and was wholly without business

experience or knowledge;" that her father always admitted that she had never received any consideration for said conveyance to him; and she also says, "that said deed was obtained from your oratrix by her father by mistake, misrepresentation, fraud and without consideration, and is null and void, and that in executing the same she was entirely under the influence and dominion of her father, and as her mother, while your oratrix was an infant of tender years, she was unable to counsel, advise or direct her but her said father, whom she was raised."

"The burden of *charging*, as well as proving fraud, is on the party alleging it; and while it is not necessary or proper that he should spread out in his pleading the evidence which he relies, he must aver fully and explicitly the facts constituting the alleged fraud; mere conclusions will not avail." *Hale v. The West Va. Oil & Oil Land Co.* 11 W. 229; *Davis v. Landcraft*, 10 *Id.* 718.

In this case the bill fails to aver *any facts* from which fraud or misrepresentation can be inferred. And the bill is equally defective in its averments in regard to any mistake. The object of pleading is to give notice to the opposite party of the character of the claim or charges against him. A mere legal conclusion is not a fact which can be proved by proof. If the facts are stated the law determines the conclusion, but the law will not infer the facts when the conclusion merely is stated. A plaintiff can no more recover with a mere sufficient averment in his bill than he can without proof of his averments if properly made. The one is as essential as the other and both must concur or relief will not be granted. A mistake for which a court of equity can grant relief must generally be mutual with the parties. It is not enough to show the sense and intention of one of the parties to the contract. Though it be clearly established that the intention of one of the parties is mistaken and misrepresented in the written contract, that cannot avail unless it be further established that the other party agreed to it in the same way, and that the intention of both of them was by mistake misrepresented by the written contract. *Lyman v. United Ins. Co.* 17 Johns. R. 377; *Alexander v. Newton*, 2 Gratt. 266.

The averments must distinctly show in what the m

consists, so that the court may not only discover whether it is such a mistake of fact as can be corrected, but also that it is not a mistake of law. For it is a settled principle of law and sound policy, that a party cannot be permitted to disavow or avoid the operation of an agreement, entered into with a full knowledge of the facts, on the ground of ignorance of the legal consequences which flow from those facts. *Shotwell v. Murray*, 1 Johns. Ch. R. 512; *Lyon v. Richmond*, 2 *Id.* 60. In such cases the bill must state the facts which occasioned the mistake as well as the mistake itself, and these facts must be clearly proven. *Rankin v. Atherton*, 3 Paige 148. The same rule, both in respect to pleading and proof applies with equal force to charges of fraud, misrepresentation and undue influence. The particular acts, words or conduct relied on to establish the fraud, misrepresentation or undue influence must be in effect averred and satisfactorily proven. In these essentials, it seems to me, the plaintiffs in this cause have wholly failed both in their pleadings and their proofs, unless the fact that the conveyance was from a child to its parent is of itself sufficient to vacate the deed. Before proceeding to consider the proofs, it will be more convenient to ascertain the principles of law governing transactions between parent and child.

In some cases it has been held: that where a child makes a gift to its parent, the simple fact of the relationship between them, is sufficient evidence of undue influence to warrant a court of equity in setting it aside unless the circumstances and facts connected with the transaction are such as to repel the presumption that such influence was exerted; and that the burden of showing such circumstances and facts rests upon the parent receiving the gift. *Archer v. Hudson*, 7 Beav. 551; *Turner v. Collins*, 7 Ch. App. Cas. 329; Kerr on Fraud and Mistake 179; *Hoghton v. Hoghton*, 11 Eng. L. & Eq. R. 135.

This seems to be the general rule established by the English courts in cases of donations from a child to its parent. In a recent English case, it was, however, held that the relation of father and daughter did not of itself render the validity of an arrangement between them respecting a reversionary interest of the daughter so doubtful as to justify a trustee in

refusing to transfer a fund in pursuance of the arrangement without the indemnity of the court. *Farmin v. Pull* DeG. & Sm. 99.

While contracts between parent and child are watched with great jealousy, not only for the purpose of ascertaining that the one likely to be so influenced understood the act he was performing, but, also, for the purpose of ascertaining that his consent to perform the act was not obtained by reason of the influence possessed by the other; not that the influence itself flowing from such relation, is either blamed or discountenanced by the courts; to the contrary the due exercise of it is considered useful and advantageous to society; but the courts hold, as an inadvisable condition, that this influence should be exerted for the benefit of the one subject to it, and not for the advantage of the one possessing it. And even the English courts hold that contracts or conveyances between parent and child whereby benefits are secured to the parent, if perfect and reasonable in all their terms and circumstances, are sustained. And in order to set aside a conveyance from a child to its parent on account of their relation to each other it will be necessary to prove the exercise of undue influence or establish some other ground of actual or constructive fraud against the parent. Hill on Trustees 218, (side page 219) and cases cited.

The American cases, with the exception of some cases in New York and perhaps some other States, fully sustain the doctrine laid down in 1 Perry on Trusts section 201, which is as follows:

"The position and influence of a parent over a child is so controlling that the transaction should be carefully scrutinized, and sales by a child to a parent must appear to be fair and reasonable. Such contracts are not, however, *prima facie* void, but there must be some affirmative proof of undue influence or other improper conduct to render the transaction void; for while the parent holds a powerful influence over the child, the law recognizes it as a rightful and proper influence, and does not presume, in the first instance, that the parent would make use of his authority and parental influence to coerce, deceive or defraud the child. Therefore

is necessary to prove some improper and undue influence in order to set aside contracts between parents and children. As purchases by a parent in the name of a child do not create a resulting trust, but are presumed, in the first instance, to be advances made by the parent to the child, so advances to the parent by the child may be a proper family arrangement, and for the best interest of the child. In such considerations can be found in the case, and the advance, after all allowances are made, is found to have been wrongfully obtained from the child, a court of equity will set it aside or convert the parent into a trustee. But the proceedings must be had at once. The child cannot wait until the parent's death, or until the rights of other parties have intervened." See cases cited in note, pp. 238-9.

In a case, which came before the Supreme Court of the United States (*Jenkins v. Pye*, 12 Pet. 241) involving the validity of a deed made by a daughter to her father, that court in its opinion says:

The first ground of objection seeks to establish the broad principle, that a deed from a child to a parent, conveying the estate of the child, ought, upon considerations of public policy, growing out of the relation of the parties, to be deemed void. And numerous cases in the English chancery have been cited to, which are supposed to establish this principle. We do not deem it necessary to travel over all these authorities; we have looked into the leading cases, and cannot discover anything to warrant the broad and unqualified doctrine contended for on the part of the appellees. All the cases are accompanied with some ingredient showing undue influence exercised by the parent, operating upon the fears or hopes of the child; and sufficient to show reasonable grounds to presume that the act was not perfectly free and voluntary on the part of the child; and in some cases, although there may be circumstances tending, in some small degree, to show undue influence; yet if the agreement appears reasonable, it has been considered enough to outweigh light circumstances, so as not to affect the validity of the deed.

It becomes the less necessary for us to go into a critical examination of the English chancery doctrine on this subject; should the cases be found to countenance it, we should

not be disposed to adopt or sanction the broad principle intended for, that the deed of a child to a parent is deemed, *prima facie*, void. It is undoubtedly the duty of the courts carefully to watch and examine the circumstances attending transactions of this kind, when brought in before them, to discover if any undue influence has been exercised in obtaining the conveyance. But to consider a parent disqualified to take a voluntary deed from his child without consideration, on account of their relationship, assuming a principle at war with all filial as well as parental duty and affection; and acting on the presumption that a parent, instead of wishing to promote the interest and welfare, would be seeking to overreach and defraud his child, 12 Pet. 253.

The doctrine of this case is recognized by the same court in *Taylor v. Taylor*, 8 How. 183, but the facts in the two cases are distinguished and in the latter the deed was set aside for fraud and false representation.

In *Greers v. Greers*, 9 Gratt. 332, a man in extreme old age conveyed the whole of his estate to one of his sons, and the court held, that as he had sufficient capacity to understand what he was doing, and there was no direct proof of fraud or undue influence, the improvidence and injustice of the deed, and the disinheriting his other children did not give rise to a presumption of an abuse of confidence, or justify the court in setting aside the conveyance. See, also, *Wray v. Wray*, 10 Ind. 126; *Howe v. Howe*, 99 Mass. 88; *Findlay v. Patterson*, 2 B. Mon. 76; *Long v. Mulford*, 17 Ohio St. 485; 18 Ohio Eq. Jur. § 309.

It seems to me that the decided weight of the authorities, especially in the American States, is that a conveyance by a child to its parent, whether with or without a valuable consideration, is presumed to be valid, in the absence of any circumstances or proof tending to show fraud, misrepresentation, or undue influence, or reasonable grounds from which the court may presume that the act was not entirely free and voluntary on the part of the child.

But even if the law were otherwise, all the authorities agree that, a voluntary deed from a child to its parent cannot be set aside after unreasonable delay. The com-

must always be made in time and not after the death of the father. *Broton v. Carter*, 5 Ves. 877; *Jenkins v. Pye*, 12 Pet. 241; *Smith v. Thompson*, 7 Gratt. 112; *Bargamin v. Clarke*, 20 Gratt. 544; Hill on Trustees, 157; Perry on Trusts, § 201.

In *Turner v. Collins*, 7 Chy. App. Cas. 329, it was held: "A voluntary deed of gift cannot, after unreasonable delay, be set aside, though the gift was of a reversion and remained a reversion."

"Lapse of time, when it does not operate as a positive statutory bar, operates in equity as an evidence of assent, acquiescence or waiver." Kerr on Fraud and Mistake, 305 and cases cited.

Let us apply these principles to the case at bar. The defendants, in their answers, specifically deny each and every allegation of mistake, fraud, misrepresentation and undue influence charged in the plaintiffs' bill. The burden of proving those allegations was, therefore, placed upon the plaintiffs, and they to sustain said allegations have filed in the cause the depositions of three witnesses, James Gardner, L. C. Rogers and A. J. Marks. It is not claimed that any of these witnesses were present at the execution of the deed here sought to be set aside; and no attempt was made to prove the circumstances preceding or attending its execution. James Gardner says, that from a conversation had with his brother, John Gardner, he understood that he held the title to the land in trust for his daughter; but on cross-examination he admitted that this was not what his brother said, but only an inference of his own. The exact language of this witness is, that: "He (John Gardner) said he held a title, and then gave his reasons for taking that title. When Pusey and his daughter were first married, he showed a disposition, he told me, to waste money, and that was his reason for taking the title—to save the property for his daughter; he didn't want it spent. In the same conversation he said that the property all came by his wife, and he wanted his children all equal, as he never designed to make a will; that the laws of West Virginia made them all equal. I understood from his conversation that he held that title in trust for his daughter." The witness says this conversation took place at Phila-

delphia in 1876, and it is the only one he ever had with his brother on the subject. From this testimony it is evident that the witness is either mistaken or he misunderstood what was said. The deed was executed *before* the marriage of the plaintiffs, yet the statement here is that when they were first married Pusey showed a disposition to waste money and that was his reason for taking the title. This certainly could not have been his reason, because it was impossible for him to know *before* the marriage what Pusey did *after* the marriage. The witness, Rogers, says, that about the year 1865 or 1866, 'Squire Gardner came to his father's house and said to him, "Ann and Pusey have sued me;" that his father asked him what for, and "he said for her interest in the land;" that his father then said to him, "I thought that you had got her to sign it to *you during her lifetime*?" He said "yes I got her to make me a deed, but that ain't worth a damn, for I gave her nothing." My father then told him he had better go and make a compromise with them, and he agreed he would try it. The witness then went with him to Wellsville where the plaintiffs resided; that there they met Pusey, and Gardner said to him, "why did you sue me?" Pusey answered, "for my wife's right." They then left the witness and after being gone sometime Gardner returned and he and witness started home, and on the way Gardner said that, "he had got it fixed; that he was to hold the *land his lifetime*; that he was going to build a house on the farm and move them up," and he says, "I can help them along a little and never mind it." Sometime after this Gardner did build a house on the farm and Pusey and family moved into it and lived there until the death of Gardner; that before he moved to the said farm he failed in business, and while on the farm he farmed part of it.

The only other witness, Marks, says, that about 1875 or 1876, he was in Virginia and stopped at the house of plaintiff and went from there to see 'Squire Gardner at his house. "He told me he had lived out his allotted time, and was now living by imposition. I told him it was about time he begun to fix up his affairs in this world. Then I talked to him about this deed from Mrs. Pusey to him, which she had made at the time she was married. I told him that it would

be a great outrage for Reason's and Reeves' heirs to get two thirds of Mrs. Pusey's interest in that farm. He acknowledged that it would not be right. He told me he had it fixed so that Mrs. Pusey would get her interest in that farm."

This is the whole of the plaintiff's testimony in regard to the deed. None of it in my judgment has even a tendency to show any mistake, fraud or misrepresentation on the part of the father. The statement of Rogers, that Gardner told him he was to hold it his lifetime is unintelligible taken in connection with the undisputed fact that he was then and had been since 1833 in possession of the land as tenant by the courtesy if not as the owner in fee of Mrs. Pusey's one third. The fact that a suit had been brought and settled by the parties; that the plaintiffs afterwards moved on the farm into a house built by the father, tends very strongly to show, that if ever there had been any ground of complaint it had been "fixed up," as Rogers testifies. But without further particularizing, I am satisfied that, conceding these witnesses to be honest and their testimony, so far as it is not contradicted by the undisputed facts, entitled to credit, the conversations they attempt to relate are too imperfect, fragmentary and indefinite to warrant the conclusion at this late day, that there was any mistake, fraud or misrepresentation in the procurement of said deed. *Horner v. Speed*, 2 Pat. & H. 616; 1 Greenl. on Ev. § 200; *Weidebusch v. Hartenstein*, 12 W. Va. 760.

In regard to the proof of undue influence or parental constraint there is none in the record. All that is attempted is to show that Mrs. Pusey before her marriage was respectful and obedient to her father; that he was an honest, just and intelligent man with will enough to govern his family; that his daughter lived with him before, and she and her husband some time after, her marriage; that his daughter was an intelligent woman having graduated at the Steubenville seminary and was at the time of executing the deed twenty-three years of age. There is not a particle of evidence or even an intimation that her father made any promise, threat or command to induce her to execute the deed. It is not attempted to show any improper conduct of any kind whatever, before, at the time or after the execution

of the deed. Nothing whatever is shown incompatible with the presumption that the act was entirely free and voluntary on her part. The testimony is just as consistent with the presumption that she desired to make the deed as it is with the presumption that she father suggested or procured her to make it.

It is, however, insisted that there was no consideration for the deed. If it was the free and unconstrained act of a daughter, it is immaterial, under the law as hereinbefore stated, whether there was or was not a consideration for the conveyance. But if the law were otherwise, the deed acknowledges the payment of one thousand six hundred dollars, and it has not been shown that that acknowledgment is untrue. This was much more than the value of the property. At the time of the partition this whole farm was valued at four thousand eight hundred dollars, and Pusey was entitled to but one third of it, subject to the estate of her father who was then a young man for her forty-five years thereafter. Deducting this life estate six hundred dollars would have been the fair value of her remainder. This was not her whole estate for she did not convey her interest in the houses and lots at Wellsburg. If the one thousand six hundred dollars was not actually paid at the time it is very probable that it was paid in the building of the house on the farm for the plaintiffs to live in and a support of the farm after they moved to it; and that the whole difficulty any ever existed was compromised and settled when the suit of the plaintiffs "for their rights" was dismissed.

But even if I am mistaken in the law and the testimony just presented, the unreasonable delay of the plaintiffs is sufficient of itself to bar any right they may have to recover if they had acted promptly. While they could not have brought for partition during the life of the life-tenant and at that time the statute of limitations did not run against the female plaintiff, still they had a right to sue in a court of equity from the time the deed was executed to have it set aside. A party may deprive himself of his equity by a delay which falls short of the statutory bar. "Lapse of time when it does not operate as a positive bar, operates in equity as an evidence of assent, acquiescence or waiver." The defendants here have been guilty of great *laches* in the as-

of their claim. The deed now sought to be canceled was made thirty-five years before the institution of this suit. They have waited until all the original parties to be affected by their claim have died, and the means of explaining the transaction have been lost. It would be unjust not only to the living but to the dead to permit the appellees at this late day, without any excuse for their great delay, to take from infants property upon a claim which they never asserted against their ancestors—*Doggett v. Helm*, 17 Gratt. 96; *Wagner v. Baird*, 7 How. 234; *Badger v. Badger*, 2 Wall. 87.

3. The only remaining ground for setting aside said deed is that it was made in fraud of the rights of the male plaintiff just before his marriage. A conveyance made immediately before her marriage by a woman is *prima facie* good, and can be impeached only by proof of fraud. *Taylor v. Pugh*, 1 Hare 608, 616; *De Manville v. Compton*, 1 Ves. & Beam. 354. But whatever may have been the rights of this plaintiff under the authorities above cited, they have long since been lost by his *laches*.

For the reasons aforesaid, I am of opinion that the said decree of the circuit court of July 27, 1881, is erroneous and must be reversed and set aside with costs to the appellants against the appellees, Wm. C. Pusey and Rachel Ann his wife, and the cause is remanded to said circuit court for such further proceedings to be had therein, not inconsistent with this opinion, as may be in accordance with the principles and rules of courts of equity.

JUDGES JOHNSON AND GREEN CONCURRED.

DECREE REVERSED. CAUSE REMANDED.

WHEELING.

SMITH v. TOWNSEND.

Submitted June 20, 1882—Decided April 14, 1883.

(*WOODS, JUDGE, Absent.)

1. A plea of *nil debet* in an action of *indebitatus assumpsit* is cured by a verdict and will be treated in the Appellate Court, as if it had been a plea of *nonassumpsit*. (p. 495.)
2. If no account of payments is filed with a plea of payment, under § 4 ch. 128 of Code of W. Va. no proof can be given by the defendant of any partial payments; but if without objection on the part of the plaintiff the defendant does prove such partial payments, the jury may properly consider such proof and base their verdict upon it. (p. 495.)
3. A simple statement of the facts in a case, though signed by the judge, is no part of the record, if not made so by an entry on the record-book or by its being incorporated in and in some manner made part of a bill of exceptions, which is made a part of the record by an entry on the record-book. (p. 493.)
4. An appellate court can not set aside a verdict and award a new trial, which the court below refused, if there be in the case sufficient evidence to justify the verdict after rejecting all parol evidence in conflict with such evidence, and which was offered by the party, against whom the verdict was rendered. (p. 494.)

Writ of error and *supersedeas* to a judgment of the circuit court of the county of Pleasants, rendered on the 26th day of November, 1879, on a *supersedeas* to a judgment of the county court of said county, wherein C. P. Smith was plaintiff in error and J. B. Townsend was defendant in error, allowed upon the petition of said Townsend.

Hon. James M. Jackson, judge of the fifth judicial circuit, rendered the judgment complained of.

GREEN, JUDGE, furnishes the following statement of the case :

*Cause submitted before Judge W., took his seat on the bench.

On August 2, 1879, C. P. Smith brought his action of *assumpsit* against J. B. Townsend in the county court of Pleasants. The controversy had its origin in the following transactions: "The plaintiff, C. P. Smith, had placed in the hands of the defendant, J. B. Townsend, an attorney-at-law, for collection a bond of Oliver Gorrell and two others, sureties, payable to the plaintiff. The bond was for seven hundred and seventy-five dollars and bore interest from 27th of May, 1872. Townsend brought suit on it in the name of Smith and obtained a judgment for the full amount. Execution was issued on it, and a forthcoming bond was given, which was for some reason not stated in the record quashed by the court; and the costs attending this were nine dollars and twenty cents, which were paid by Townsend for the plaintiff against whom was the judgment for costs. Another execution was issued on this judgment; and Gorrell obtained an injunction enjoining the enforcement thereof. It does not appear, what were the allegations of the bill of injunction in other respects, but it claimed an offset due from Smith to Gorrell of sixty-four dollars and thirty-eight cents. It does not appear, when this offset became due, or from what time it bore interest properly, or its character.

On June 16, 1876, Gorrell and Smith entered into a written agreement as a compromise of their difficulties. By this compromise this offset of sixty-four dollars and thirty-eight cents was allowed and directed to be credited on Smith's judgment against Gorrell; and Gorrell agreed to abandon all other defenses and objections set up in his bill of injunction, and to pay all the costs of the injunction suit except the fee taxable to Smith's attorney, and to pay to Smith then, which he did, twenty-five dollars on his judgment; and Smith agreed to stay executions for the balance till May 1, 1877. Townsend subsequently collected the balance of this claim of Gorrell; and in so doing he credited this claim by Gorrell's offset of sixty-four dollars and thirty-eight cents as of May 27, 1872, which was the date of Gorrell's bond to Smith.

On the 8th day of July, 1878, Townsend made out for Smith a written statement of these transactions including in it a credit of three hundred dollars cash paid to Smith by Townsend.

The following is a copy of this statement :

<div style="display: flex; align-items: center; justify-content: center;"> <div style="text-align: center; margin-right: 10px;"> "C. P. SMITH. <i>vs.</i> OLIVER GORRELL AND OTHERS. </div> <div style="font-size: 3em; margin-right: 10px;">}</div> </div>	
Debt.....	\$775 0
Interest from 27th May, 1872, to 8th July, 1878.....	280 4
Debt and interest.....	\$1055 4

CREDITS.

Account equal with note.....	\$ 64 38
Equal interest of note.....	23 50
Injunction attorney fee paid you.....	25 00
Interest 16 June, 1876, to 8 July, 1878.....	3 91
Cash paid you by me.....	300 00
Interest 8th Feb. to 8 July, 1877.....	7 50
Commission on entire debt.....	21 10
Injunction attorney fee, "open".....	25 00
Costs in quashing f. c. bond.....	9 20
Order to you from O. Gorrell.....	1 59
Charges on check paid Morgan, cl'k.....	25
	<hr style="width: 100px; margin-left: 0;"/> \$ 481 4

\$573 8

This statement was not, however, delivered to Smith but on August 1, 1878, when they finally settled. There was a balance due from Townsend to Smith of one hundred and seventy-three dollars and ninety-nine cents, which Townsend paid to him in cash on August 1, 1878, delivering to him at the same time the above statement, and taking from him a receipt in full. The commission charged in this statement was 2 *per cent.*, the amount which Townsend had agreed to charge, when this claim against Gorrell was placed in his hands for collection and Townsend told that Smith examined this statement and said, it was all right, and after he had examined, signed the receipt in full; the receipt was also read to him before he signed it; then Townsend told Smith, he charged him twenty-five dollars for defending the chancery suit, to which he did not object, and Smith likewise told him to charge to him, Smith nine dollars and twenty cents costs, which Townsend paid for him, when the forthcoming bond was quashed by the court. These items appeared among the credits in this statement furnished by Townsend to Smith. When this settlement

was made Townsend took up from Smith the receipt which he had given him for the collection of this bond of Bell and others.

Smith says, he did not read this statement made out by Townsend, but simply asked if it was all right, and Townsend said it was all right, and presented the receipt, which he read on Townsend saying, that, if there was anything wrong, he would make it right. He took this statement and, when he had examined it, concluded he was satisfied by it. But Townsend would make none of the corrections, which he demanded, except that on April 23, 1879, he paid Smith's wife for him three dollars and eighty cents, in calculation of interest. And in the following month he brought this suit.

The declaration, after it had been demurred to, was amended, and in its amended form states, that the defendant Townsend, was indebted in 1878 to the plaintiff, Smith, the sum of one thousand dollars, collected from Oliver Bell and his sureties for this plaintiff, and in a like sum of money had and received by the defendant for the use of the plaintiff, and for the like sum on money found due from the defendant to the plaintiff on an account stated, which the defendant promised to pay less two *per cent.* for the collection, but the defendant has refused to except three hundred dollars paid February 8, 1878, also five hundred and seventy-three dollars and ninety-nine cents paid July 8, 1878, and three dollars and eighty-six cents paid as of like date, making in all eight hundred and seventy-seven dollars and seventy-five cents, leaving a balance due the plaintiff of one hundred and twenty-two dollars and twenty-five cents to the plaintiff's demand, one thousand dollars. No bill of particulars was filed with this declaration.

A plea in abatement was filed and demurred to, and the demurrer was sustained. The order-book of the next term contains this entry in this case: "And thereupon the defendant for plea saith, he does not owe and has well and truly paid the debt in the declaration mentioned, and he has made a plea in writing of accord and satisfaction." This amended plea states, that the plaintiff's demand has been fully paid off and discharged by payments made to the plaintiff on

August 1, 1878, and on April 23, 1879, amounting in aggregate to one thousand and fifty-nine dollars and twenty-eight cents, which were received by the plaintiff in full satisfaction of the debt, interest and costs in the declaration mentioned. And for a further plea he said, he had paid the debt by accord and satisfaction and by payment in full of the receipts taken by him, the defendant, in full of the plaintiff's demand. To all these pleas general replications were filed and issue joined on them. No bill of particulars or account of payments was filed by the defendant with any of his pleas.

The jury was sworn to try these issues, and on September 16, 1879, found a verdict for the defendant. A new trial was asked for, because the verdict was contrary to the evidence; and on the 19th of September, 1879, it was refused, and judgment was entered in favor of the defendant against the plaintiff for his costs. A bill of exceptions was taken from this action of the court, in which bill of exceptions, it was claimed, the court certified all the facts proven before the jury. It also signed and made a part of the record another bill of exceptions of the plaintiff for permitting testimony which he deemed improper, to go to the jury. The facts proven at the trial, if we can regard them as a part of the record, were all those, which, we have stated, constituted the transaction, out of which this controversy arose. No witnesses were examined except the plaintiff and the defendant, and their testimony has already been stated. The only objection made by the plaintiff to the admission of any of the parol testimony was, that Townsend was permitted to summarize the jury in speaking of the compromise between Smith and Gorrell made in his presence and reduced to writing, "he understood that Gorrell was to be allowed interest on said sixty-four dollars and thirty-eight cents as of the date of Gorrell's note, and he had accordingly so allowed it in his settlement with Gorrell." This was objected to as changing the written agreement and calculated to mislead the jury. The written agreement was, that Smith "agreed to give Gorrell credit for the sum of sixty-four dollars and thirty-eight cents, the amount of said Gorrell's *off-set*s as filed by him against said Smith, and nothing more, completing all outstanding charges of said Gorrell against Smith to date

This agreement was dated June 16, 1879; and Gorrell's note or bond bore date May 27, 1872. Smith stated, that he never agreed to any of the credits named in the paper, which Townsend had promised him, except the first credit, sixty-four dollars and thirty-eight cents, but not the interest thereon, twenty-three dollars and fifty cents, the third credit of twenty-five dollars paid by Gorrell to Smith, which was right and the interest thereon, the three hundred dollars cash paid him by Townsend February 8, 1877, and the interest thereon. The commission was right, twenty-one dollars and ten cents. The attorney's fee in the injunction suit, twenty-five dollars, he never agreed to, nor the costs in quashing the forthcoming bond, nine dollars and twenty cents. The order of Gorrell, one dollar and fifty-nine cents, he admitted was correct, and the twenty-five cents charge on check he says nothing about. Most of these statements, as before said, Townsend denied as a witness before the jury.

A writ of error and *supersedeas* was granted the plaintiff, Smith, to this judgment of the county court rendered September 19, 1879, and on the 20th of November, 1879, it was reversed and annulled by the circuit court of Pleasants, and a new trial awarded, and the case retained in said circuit court for trial. From this judgment of the circuit court a writ of error and *supersedeas* has been awarded on the petition of the defendant, Townsend.

John A. Hutchinson for plaintiff in error cited the following authorities: 12 W. Va. 20; *Bowyer v. Chestnut*, 4 Leigh; 6 Leigh 135; 7 Leigh 608; 9 Leigh 30; 16 W. Va. 784, 785; 3 W. Va. 29; *Id.* 386.

Henry M. Russell for defendant in error cited the following authorities: 4 W. Va. 134; 8 Gratt. 557; 8 W. Va. 452; 16 W. Va. 651.

GREEN, JUDGE, announced the opinion of the Court:

The question involved in this case is: Ought the circuit court of Pleasants on the writ of error from the county court of Pleasants to have reversed the judgment of the county court and set aside the verdict of the jury and

awarded a new trial? It is claimed by the counsel for Townsend, that it could not do so properly, because the county court had certified neither the facts proven nor all the evidence in the case, which was before the jury. If this be of course the circuit court ought not to have reversed the judgment of the county court, as it had no means of determining, whether it was right or wrong. What the record of the county court does show is simply this memorandum: "Be it remembered, that on the trial of this case the plaintiff excepted to the opinion of the court and tendered in open court his bills of exceptions marked No. 1 and No. 2 in words and figures following, to-wit: 'Be it remembered &c., and asks, that the same may be signed, sealed and saved to him and made a part of the record in this case, which is accordingly done.'" This made formally everything in these bills of exceptions marked No. 1 and No. 2 parts of the record as effectually as if all, which appeared in the record had been spread out at length on the record-book.

Bill of exceptions No. 1 referred to does not state any of the evidence, which was submitted to the jury except a statement about a single point made by a witness, which the plaintiff objected to as illegal testimony. Of course on that fraction of testimony no new trial could have been properly awarded by the circuit court.

Bill of exceptions No. 2 referred to on the record-book states the evidence of the county court and made also a part of the record, as much so as if everything on its face had been set out at length in the record, states the plaintiff's motion for a new trial, because the verdict was contrary to the evidence, and the overruling of the same and the entry by the court of the judgment on the verdict; and it then proceeds: "To which ruling of the court the plaintiff excepts and tenders this his bill of exceptions No. 2 and asks, that the same be signed, sealed and saved to him and made a part of the record in this case, which is accordingly here done." Then follows the names of the members of the court and immediately thereafter these words, "and the substance of the evidence is set out below, as follows." Then follows all the evidence submitted to the jury in detail, and without any further conclusion here is appended again at the end the signatures of the th

t

members of the court. If this "substance of the evidence" can be regarded as incorporated in and constituting a part of bill of exceptions No. 2, then this evidence is properly a part of the record, otherwise, not. See *Ramsberg, Koogle & Co. v. Erb*, 16 W. Va. 784, 785. If the first set of signatures of the members of the court had not been attached, but only the signatures at the end of the substance of the evidence, there could be no doubt, that this substance of the evidence ought to be regarded as a part of bill of exceptions No. 2. If the part immediately following this first set of signatures be read in connection with that preceding them we can not avoid the impression, that they were intended to be continuously read thus: "To which ruling of the court the plaintiff excepts and tenders this his bill of exceptions No. 2 and asks, that the same be signed, sealed and saved to him and made a part of the record in this case, which is accordingly here done, and the substance of the evidence below, as follows:" (Stating it in detail and the signatures of the members of the court thereto.) This would be a rather awkward mode of setting out the matter yet while it may not be very probable, yet so far as the record before us shows the paper might have been originally drawn in this form and signed; and then the signatures of the members of the court may have been also appended at the end of the statement of the substance of the evidence simply for identification. From the manner in which this statement of facts begins it looks as though it was all intended as an interlineation in the second bill of exceptions to be inserted above the signatures and seals of the members of the court, perhaps just before the words "which is accordingly here done."

What was the fact in this respect could only be ascertained by an inspection by this Court of the original papers. As in the view we take of this case the decisions of this Court will be unchanged by our regarding this substance of the evidence as a part of the record, we have concluded to do so, though had it, if so regarded as a part of the record, effected any rights, he should have been compelled to have the original papers brought up for our inspection, so that we might determine, whether this statement of this substance of the evidence did or did not in point of fact constitute a part of bill of

exceptions No. 2; for if it did not, it is no part of record.

When we read this paper, we find, that there were two witnesses examined before the jury, one the plaintiff the other the defendant; that the defendant testified before the jury in substance, that he paid over to Smith all moneys he had collected for him after deducting twenty dollars a fee in a chancery suit, which Smith owed to and nine dollars and twenty cents costs, which he had on the quashing by the court of a forthcoming bond, and which costs therein there was a judgment against Smith retaining further his commission agreed on for the collection; that these sums were retained with the knowledge and consent of Smith, who examined the statement that the defendant had made out showing these retentions for the purposes; and that he said it was all right, and then executed to him, the defendant, a receipt in full for the claim.

If this testimony of Townsend was believed by the jury, they could not possibly have done otherwise than render a verdict for the defendant, as they did. But the plaintiff positively contradicted many of the statements of the defendant. However, according to the well settled rule of every appellate court such evidence of the exceptor contradicting the adverse party must be rejected, as the jury appeared by their verdict to have given full credence to the statements of the defendant on his examination. See *Sanaker v. Cushwa*, 3 Va. 29. This being obviously the conclusion, which must be reached, if the real merits of this controversy were before the jury on this trial, the counsel of the defendant in error insists, that such was not the case upon the pleadings, where it is argued consisted of two pleas: one a plea of payment supplemented by no account of payment; and a nondefault called a plea of accord and satisfaction. The counsel of the defendant in error insists, that the general issues were pleaded; and that under this state of pleadings the indebtedness of the defendant to the plaintiff was not in issue, and it was only necessary for the plaintiff to indicate the amount *prima facie*. The burden of proof, it is insisted, was, under the pleadings, on the defendant; and this could not under the pleadings be met, because he had no right to prove "in

partial and specific payments," because he had filed no bill of particulars with his plea of payment. And the same may be said of his fee and of the costs paid by him to the plaintiff. They are set out in no bill of particulars. Therefore, it is deemed, could not be proven.

This is the ground, on which the defendant in error is allowed to rest his case. But there is really nothing whatever

The record-books of the county court has on it this entry: "And thereupon the defendant for plea says, he does swear and has well and truly paid the debt in the plaintiff's declaration mentioned and filed a plea in writing of accord and satisfaction, to which several pleas the plaintiff replied generally and issue was thereupon joined." This shows the state of the pleadings. It is true, this plea of "*nul debet*" might have been demurred to; and the demurrer must have been sustained. For it was obviously no proper plea in *assumpsit*. But the plaintiff did not do so, but chose to join issue upon it; and this was one of the issues before the jury. At the rendition of the verdict this Court by reason of our duty to the parties would regard the issue tried, precisely as if the proper rather than an improper general issue had been pleaded. We will therefore review this case, just as if an objection had been made up on a plea of *non assumpsit*. In *Hunter et als. v. Carsley*, 1 H. & M. 153, in an action of covenant the plea was "not guilty," on which issue was joined, and a verdict and judgment were rendered for the plaintiff. It was affirmed by the appellate court, as if the plea had been the proper plea to raise the general issue; and the judgment was affirmed. And the same view substantially was taken by this Court in the case of *The State use of Crumbacker v. Seaton*, 15 W. Va. 595. See the numerous authorities there cited. The burden then of his establishing his case was on the plaintiff in the trial before the jury.

With regard to the failure of the defendant to file with his plea of payment any bill of particulars it is clear, that under section 120 § 4 of the Code of W. Va. p. 609 the plaintiff and the jury at the trial have objected to the admission of any proof of any specific partial payment, as the admission of such evidence would be a surprise to the plaintiff. But if the plaintiff knows exactly what specific partial payments are

claimed, and he chooses, as he did in this case, to put them to be proven, though no bill of particulars has been filed, he has a right so to do, and he thereby waives objections to their being considered by the jury, just as though a bill of particulars had been filed. All of the credit set out in the statement furnished by Townsend for Smith became payments, when Smith agreed, that they should be so regarded, as Townsend testified he did. This was contradicted by Smith. But the jury appear to have believed Townsend's statement. Then by the conduct of the plaintiff at this trial this cause was tried upon its full merits as if all the pleadings had been regular; and this being the case, a mere glance at the evidence must satisfy any one that the verdict of the jury could not be set aside as either contrary to the evidence or against its weight.

It remains only to consider, whether the county court erred in the matter stated in the first bill of exceptions. It is not an error to permit the defendant to testify, that he understood, that Gorrell was to be allowed interest on the six hundred and four dollars and thirty-eight cents, as of the date of Gorrell's note to Smith, and that he had in settling with Gorrell allowed him interest from that date? This testimony, if true, does not contradict the written agreement, which showed when the sixty-four dollars and thirty-eight cents was to be credited. Now really this written agreement, as it is presented to the jury, seems to me not to indicate when this sixty-four dollars and thirty-eight cents was to be credited to Gorrell. Smith in the agreement simply agreed to give Gorrell credit for six hundred and four dollars and thirty-eight cents "the amount of said Gorrell's *offsets* as filed by him against Smith." This means to credit these offsets at the amount and date, as they are shown in the exhibit filed in the chancery suit. As we have not this before us, we cannot say of what date this sixty-four dollars and thirty-eight cents should have been credited. Nor can we say, that Townsend in any way contradicted his paper, when he said it was understood, that Gorrell was to be credited with this sum sixty-four dollars and thirty-eight cents as of the date of the note of Gorrell, that is of May 27, 1872. But it is entirely immaterial in this

whether by this agreement this sum was to have been credited as of a much later date or not; for this suit was not brought to hold Townsend responsible for his *failure* to collect of Gorrell as much as he ought to have collected, but to compel him to pay a balance claimed to be due on the amount, which he had *actually* collected of Gorrell. Now Townsend testified, that he did not collect this sixty-four dollars and thirty-eight cents nor the interest on that amount after the date of Gorrell's note, May 27, 1872, but that he credited the debt due to Smith with this sixty-four dollars and thirty-eight cents as of May 27, 1872. In this suit it is totally immaterial, whether this was in accordance with the agreement of parties or not. And therefore this statement of Townsend to the jury, that it was according to his understanding of the agreement of the parties, could by no possibility have influenced the jury in their verdict to the prejudice of the plaintiff; and it can therefore constitute no ground for setting aside this verdict.

Our conclusion therefore is, that the circuit court of Pleasants county erred in reversing the judgment of the county court in setting aside the verdict of the jury and in awarding a new trial; and this judgment of the circuit court of Pleasants, rendered November 20, 1879, must be set aside, reversed and annulled; and the plaintiff in error, J. B. Townsend, recover of the defendant in error, C. P. Smith, his costs in this Court expended; and this Court proceeding to render such judgment, as the circuit court of Pleasants should have rendered, doth approve and affirm the judgment of the county court of Pleasants rendered on September 19, 1879, and doth order, that the defendant in error in said circuit court of Pleasants, J. B. Townsend, do recover of the plaintiff in error in said circuit court, C. P. Smith, his costs in the said circuit court expended.

THE OTHER JUDGES CONCURRED.

JUDGMENT REVERSED.

WHEELING.

JOHN *et al.* v. BARNES *et al.*

Submitted June 13, 1882—Decided April 14, 1883.

(WOODS, JUDGE, Absent.)

1. A testator used the following language in his will: "I bequeath unto my wife, Lucy, all the balance of my estate, both real and personal, to have and to hold as long as she remains my widow. At her death I direct, that my estate shall be divided as follows: Unto my sons Alvin and Rush I will and bequeath the farm-house and lot now in the occupancy of Wm. O. Protzman; and the residue of my estate I direct to be equally divided between my daughters," (naming them) "and my two sons Alvin and Rush. * * I hereby constitute and appoint my wife, Lucy, my executrix with full power to sell and transfer any of my real estate, that she may deem proper, and to do and perform everything necessary to be done." **HELD:**

I. The widow took a life-estate only in the real and personal property. (p. 501.)

II. General power was conferred upon her as executrix to sell and convey in fee simple any of the real estate. (p. 501.)

III. The purchasers were not bound to look to the application of the purchase-money. (p. 503.)

IV. The executrix under said power having sold and conveyed a tract of two hundred and forty-one and one-half acres of land, a suit brought after her death to have partition among the devisees under the will was properly dismissed.

Appeal from and *supersedes* to a decree of the circuit court of the county of Monongalia, rendered on the 7th day of September, 1880, in a cause in said court then pending, wherein Sisson John and George W. John, her husband, were plaintiffs, and Eliza Barnes and others were defendants, allowed upon the petition of said plaintiffs.

Hon. A. B. Fleming, judge of the second judicial circuit, rendered the decree appealed from.

The facts of the case appear in the opinion of the Court.

Houston and *Frame* for appellants cited the following au-

Cause submitted before Judge W. took his seat on the bench.

31	496
34	27
21	496
48	221

ities: 12 Heisk. 645; 2 Burr. 1027; 3 Lom. Dig. 274; 30 326; Wade. Law of Notice, 135; 3 How. 333; 8 at. 421; 11 Gratt. 111; 8 Gratt. 140; 3 Leigh 12; 6 h 696; Fisher v. Bassett, 9 Leigh; Jackson v. Updegraff, b; 1 Patt. & H. 121; 48 Tex. 178; 54 Ala. 342; 1 Lan. (2d. Ed.) 465; 77 N. C. 437.

H. Keck for appellees cited the following authorities: m. Exr's 361, 367; *Id.* 219, 223; 20 Gratt. 692; 9 Gratt. 2 Redf. Wills p. 122, § 18; 11 Gratt. 454; 13 Gratt. 1 Lead. Cas. Eq. 76, 92; 6 Call. 308; 2 Rand. 294; ry Eq. Juris, §§ 1124, 1132; 1 Lom. Dig. 243, 248.

HNSON, PRESIDENT, announced the opinion of the Court:

is was a suit in equity brought by Sisson John and ge W. John her husband in October, 1877, in the cir- court of Monongalia, to have partition of a tract ro hundred and forty-one and one-half acres of land g the devisees of John S. Dorsey, deceased, of whom female plaintiff was one. The residue of said devisees made defendants; also Benjamin M. Dorsey, who had ased said tract of land from Lucy A. Dorsey, executrix e last will and testament of said John S. Dorsey, ded; also the several alienees of said Benjamin were made dants. The bill alleges, that said Dorsey died testate ctober, 1855, owning among other property, which is cribed, the said tract of land. The bill exhibits the will id Dorsey and alleges, that said executrix sold and con- d said tract as such, and states the subsequent aliena- thereof. It further alleges, that said Benjamin M. ey and the subsequent purchaser of said tract claim, that executrix had the right and authority under the will to nd convey in fee the said tract of land, and refused to nder the same to the said devisees, although said widow executrix, who, the bill alleges, had only a life estate in roperty, is dead; but that in truth said executrix only he right to convey such interest in said tract, as she nder the will, that is, a life-estate only, and that they ntitled to have it partitioned among them according to rovisions of the will, and that, even if the will conferred

upon said executrix the power to sell and convey said land to the purchaser thereof, he had full notice, that the devisees were entitled under the will to the proceeds of such sale, and each purchaser was bound to see to the application of such proceeds, and was responsible and liable to said devisees for the same; and said tract of land in their hands is also liable therefor.

The prayer of the bill is, "that partition be made of said tract of land among the said devisees of the said John S. Dorsey and the heirs of such as are dead, and that the said purchasers thereof be made to account to them for the sales and profits of the same from the death of said Lucy A. Dorsey, the widow, or, if it should be held, that she had the right and authority under said will to sell and convey the fee in said tract, that the said purchasers be compelled to account to the said devisees and the said heirs for the price and value of said land. And they further pray for further relief both general and special in the premises."

The will is as follows: "Be it known that I, John S. Dorsey of Monongalia county and State of Virginia, do publish this my last will and testament. First. I direct, that all my just debts be paid, then I will and bequeath unto my son, Alvin, my set tinning tools, and unto my daughter, Eliza, one hundred dollars in money, and unto my wife, Lucy, all the balance of my estate both real and personal to have and to hold as long as she remains my widow. At her death I direct, that my estate be divided as follows: unto my sons Alvin and Rush, I will and bequeath the frame house and lot now in the occupancy of Wm. O. Protzman, and the residue of my estate I direct to be divided equally between my daughters Sisson, Lou, Argat, Mary Ellen, Lavara, Amanda, Priscilla and Eliza, and my two sons Alvin and Rush. My son George having already a considerable amount of my estate, unto him I make no bequests. I hereby constitute and appoint my wife Lucy my executrix with full power to sell and transfer any of my real estate, that she may deem proper, and to do and perform everything necessary to be done. In testimony whereof, &c."

The deed of the executrix conveying said tract of land is exhibited with the bill.

The purchasers answered the bill and insisted, that under a proper construction of the will the executrix had full power to sell and convey said tract of land, and denied, that they were bound to see to the application of the purchase-money. The depositions show, that the purchase-money, six thousand dollars, was all paid to the executrix. The said depositions further show, that said land was unproductive, the farm much out of repair, and it was greatly to the interest of the widow, who had a large family to support to convert the said realty into personalty. The bill shows, that the executrix gave bond when she was qualified in the penalty of three thousand dollars. The record fails to show, that she was ever required to give any further bond. The bill alleges, that when the widow died she only had about one thousand dollars worth of property. The evidence shows, that these heirs received the benefit of much of the proceeds of the property. The record shows, that not long before his death the testator tried to sell the said tract of land for about the same price, which the executrix received for it. According to the view, which we take of this case it is unnecessary to state more of the record.

The cause was finally heard on the 7th of September, 1880, and the court dismissed the bill with costs. From this decree the plaintiffs appealed.

Two questions only are raised by the record. The first is: Did the will of John S. Dorsey confer upon his executrix the power to sell and convey the fee in the tract of land, partition of which is sought? Second. If such power was conferred, was the purchaser bound to see to the application of the purchase-money? It is clear from the language of the will, that the widow only took a life estate in the real and personal property devised; this is admitted by the counsel for appellees. It is contended, that the will could not be construed to confer the power to sell and convey the fee in the real estate because the testator had before directed, that a certain portion of his real estate should be given to his two sons after the death of his widow. In order to arrive at the intention of the testator, the different clauses in the will must be construed together. One clause is often construed to modify another. In *Bradly v. Wescott*, 13 Ves. 445, the testator gave

all of his personal estate to his wife, for her sole use for life; and the court held, that as the testator had given in express terms an interest for life, the ambiguous words afterwards thrown in could not extend that interest to the absolute property. The master of the rolls said: "I must construe the subsequent words with reference to the express interest for life previously given, that she is to have a free and absolute disposition as a tenant for life can be."

In *Smith v. Bell*, 6 Pet. 68, the testator gave all his personal estate, after certain payments to his wife, "to and for her own use and disposal absolutely," with a provision that the remainder after her death should go to his son. The court held, that the latter clause qualified the former. The court showed, that the wife took only a life-estate. Marshall J., said: "Even the words 'disposal absolutely,' may by their character qualified by restraining words connected with them, and explaining them to mean such absolute disposal as a tenant for life may make."

In this will the testator uses this language: "Unto my wife, Lucy, all the balance of my estate both real and personal to have and to hold as long as she remains my wife. At her death I direct, that my *estate* shall be divided as follows: Unto my sons Alvin and Rush, I will and bequeath the farm-house and lot now in the occupancy of Wm. Protzman, and the residue of my *estate* I direct to be equally divided between my daughters, &c. * * I hereby constitute and appoint my wife, Lucy, my executrix, with full power to sell any of my real estate, that she may see proper, and to do and perform everything necessary to be done."

To aid in the true construction of a will evidence may be received of any facts known to the testator, which may reasonably be supposed to have influenced him in the disposition of his property; also of all the surrounding circumstances at the time of making the will. *Magers v. Edwards*, 13 W. Va. 822. We here find this widow left with a family, mostly daughters, to support and educate. The evidence also shows, that the farm in controversy in this case was out of repair, and yielded but little; that a short

Before the testator's death, he had offered the farm for sale at the same price, which executrix received for it. It is clear to my mind, that the testator intended to give his full power to convert any and all the real estate into personalty, and to convey the same, as his executrix in fee, to the purchaser. As to whether the executrix by her conveyance of other real estate mentioned in the bill passed the fee simple therein to the purchaser, or only a life-estate, or what would be the responsibility of said purchaser to the devisees, we express no opinion as these questions are not here involved.

It was in the power of the devisees, if the widow was not making proper investments or was wasting the estate, to rely on the force of her ample bond for their protection. There is no evidence, that they did so; and it may be that the reason for not doing so, was that it was used for their benefit. The executrix, by executing her deed for the farm of two hundred and forty-one and one-half acres to Benjamin M. Dorsey conveyed him the fee in said farm, as she had the power to do. She had a general power to sell and convey, therefore the purchasers took a good title, and was not bound to enquire what was to be done with the purchase-money. This is not one of those cases, in which the executrix has a qualified power over all real estate, as if the personalty shall not be sufficient to pay the debts, therefore many of the authorities cited by the appellants have no application here. It is clear, that the purchasers were not bound to see to the application of the purchase-money.

When an interval must or may properly elapse between the sale and the application of the purchase-money, the purchaser is not bound to see to its application. *Woolwine v. Woodrum*, 19 W. Va. 67. Here the application of the purchase-money was not to be made until the widow remarried again or died.

There is no error in the decree complained of and it is affirmed with costs and thirty dollars damages.

JUDGES GREEN AND SNYDER CONCURRED,

DECREE AFFIRMED.

WHEELING.

MERCHANTS BANK v. JEFFRIES, ADM'X.

Submitted January 25, 1883—Decided April 21, 1883.

1. The cashier of a bank, intrusted with the control and custody of its funds, will in a court of equity be held as a trustee for said bank and may be sued by it in such court, and compelled to account for and pay any loss sustained by it, which was caused by any negligence or wrongful conversion or by any misapplication or use of any of its funds by such cashier in violation of the duties of his said trust. (p. 507.)
2. Where a bill filed by a bank against its cashier for a settlement of his accounts as such only alleges, that the defendant was such cashier; "that during his term as cashier he lent sundry sums of money to sundry irresponsible persons without the consent of the board of directors of said bank, for which he is liable personally; and that the books and papers and cash-items show a large deficiency in the assets of said bank during the said cashier's term" of office; and said bill contains no averments, that said bank sustained any loss by such unauthorized loans; or that the moneys so lent have not been repaid; or that said deficiency in its assets was caused by any act or negligence of such cashier, it is *clearly insufficient*; and a demurrer thereto ought to be sustained, because it presents no cause of action against said defendant. (p. 508.)

Appeal from and *supersedeas* to a decree of the circuit court of the county of Kanawha, rendered on the 9th day of January, 1878, in a cause in said court then pending, wherein the Merchants Bank of Charleston was plaintiff, and Marie L. Jeffries, administratrix of George Jeffries, deceased, was defendant, allowed upon the petition of said Jeffries.

Hon. Homer A. Holt, judge of the eighth judicial circuit, rendered the decree appealed from.

WOODS, JUDGE, furnishes the following statement of the case :

This was a bill filed in the circuit court of Kanawha county against George Jeffries by the Merchants Bank of Charleston, which after excluding the caption thereof was in the following words: "That several years ago, said defendant

21	504
32	131
21	504
63	9

was appointed its cashier, and entered upon the discharge of his duties as such; that he was requested and required to give bond as such cashier as required by law, but failed to do so; that during the time he was such cashier, he lent sundry sums of money of said bank funds to sundry irresponsible persons without the consent of the board of directors for which he is personally liable; that the books and papers and cash items show a large deficiency in the assets of the bank during his term as cashier;" and then "prays that these matters be enquired into by a commissioner; that he be held liable therefor, that he be decreed to pay the same," and for general relief, &c. At August rules, 1872, the bill was taken for confessed; said Jeffries died, and at the June term of said court, 1873, his death was suggested, and the cause was then revived against Marie L. Jeffries, who qualified as his administratrix, who thereupon appeared and demurred to said bill and assigned the following causes of demurrer:

"1st. A court of equity has no jurisdiction for any misfeasance committed by George Jeffries as cashier of the Merchants bank.

"2d. The complainant's bill is too vague and indefinite.

"3d. It does not give the names of the parties to whom Jeffries unlawfully loaned money, the amount of the money loaned nor the date of the loan.

"4th. It does not point out the items of deficiency in the books of the bank.

"5th. The bill gives no notice by which a defense could be made, nor would the defendant be protected by the record from another suit for the same subject matter.

"6th. Courts of equity do not take cognizance of torts.

"7th. Because the accounts are all on one side and no discovery is sought or required."

The court overruled the demurrer and referred the cause to a commissioner to take and report an account showing the amount loaned out or disposed of to irresponsible persons by said Jeffries, while acting as such cashier; 2d. Any other loss, which the said plaintiff has sustained by the unauthorized acts of said Jeffries in misappropriating the plaintiff's funds; 3d. Any other pertinent matter, &c.

A report was made by the commissioner, to whom this

cause was referred, which was excepted to by both parties, as appears by the final decree; neither the commissioner's report nor the exceptions thereto nor any of the testimony taken in the case appears in this record.

On the 9th of January, 1878, the said court rendered a final decree in said cause in favor of said plaintiff for nine hundred and sixty-nine dollars and thirty-seven cents with interest and costs against the said administratrix, out of the assets in her hands to be administered.

From this decree the said administratrix obtained an appeal and *supersedeas* to this Court.

A. Burlew for appellant cited the following authorities: Mitt. & Tyl. Pl. 204; *Id.* 305, 306 and notes; Story Eq. Juris. §§ 451, 459; *Id.* § 359; *Towle v. Laurason*, 5 Pet.

J. H. & J. F. Brown for appellee cited the following authorities: 2 Story Eq. Juris. §§ 462, 463; 4 Leigh 223; 19 Gratt. 62; 21 Gratt. 263; 31 Gratt. 212.

Payne & Green, for appellee, cited the following authorities: 1 Barton Chy. Pr. 67; 19 Gratt. 62; 9 Jur. N. S. 1124; 11 Jur. N. S. 215; Story Eq. Juris. § 459 a; 21 Gratt. 263; 31 Gratt. 212; 4 Leigh 223; 15 W. Va. 547.

WOODS, JUDGE, announced the opinion of the Court:

As neither the report of said commissioner, nor the evidence supporting the same, nor any of the exceptions thereto, nor any evidence taken in the progress of the cause appears in this record, the court cannot determine, whether the said exceptions ought to have been sustained or not; but as all things done by the court are presumed to be rightly done, until the contrary is made to appear, it must in the absence of such proof be presumed, that the said exceptions to said commissioner's report were rightly disposed of. *Callaghan v. Kippers*, 7 Leigh 608; *Harris v. Lewis*, 5 W. Va. 575. In considering the questions of law presented by the defendant's demurrer to the plaintiff's bill it will be well to examine the grounds, upon which courts of equity have assumed to exercise jurisdiction over matters of account. A court of equity is said to have "jurisdiction in cases of rights recognized and

protected by the municipal jurisprudence, where a plain, adequate and complete remedy cannot be had in the courts of common law." Story's Eq. Juris. § 33. One of the most important methods of equity is, that it addresses itself to the conscience of the defendant and requires him to answer upon his oath the matters of fact stated in the bill, if they be within his knowledge; and he is compelled to give a full account of all such facts with all their circumstances, without evasion or equivocation. (*Id.* 31.) And the right of a party to the aid of a court of equity, to obtain from a defendant a discovery of the facts within his knowledge, necessary to sustain the plaintiff's demand against him, is of itself the source of jurisdiction in many cases, not otherwise cognizable therein; for it is generally true, that the court of equity, having taken jurisdiction of the cause to compel a discovery will, if the same be had, retain jurisdiction thereof and afford the parties all the relief, to which they are generally entitled.

The counsel for the plaintiffs, to maintain the sufficiency of the bill in the case at bar, rely in substance upon two propositions, assuming, that, if they can maintain these, the defendant's demurrer was rightly overruled. The first proposition is, that the said George Jeffries as the cashier of the plaintiff was, during his continuance in office, its trustee, for the benefit of all persons interested in its assets; and secondly, that even if he cannot properly be held as a trustee, yet as its trusted and confidential agent, having charge of its funds, it was his duty to keep careful accounts of all his transactions in dealing with said funds, and that whether he be treated as trustee or as agent, a court of equity is the proper tribunal, in which to require him to settle his accounts.

As the cashier of the plaintiff the said George Jeffries occupied the most confidential relation to it; he was intrusted with the custody, care and management of all its funds; he received and disbursed them in the line of his duties as cashier, and was charged with the duty of keeping the accounts of all these transactions upon the books of the bank, by examination of which stockholders could learn the true condition of the property entrusted to his care; and it was his duty to account for, and pay over to the plaintiff all moneys in his

hands, when he retired from his office. The duties thus devolved upon him to be discharged for the benefit of all persons interested in the assets of the bank created him a trustee for that purpose; and a court of equity was the appropriate tribunal, in which he should be compelled to settle the accounts of his said trust. *Berkshire v. Evans*, 4 Leigh; *Coffman v. Sungston*, 21 Gratt. 263; *Zetelle v. Meyers*, 19 Gratt. 62; Story Eq. Juris. §§ 962, 975 a, 1196. We are therefore of opinion, that, if a proper bill had been filed in the case at bar, it could have been sustained against said Jeffries as such cashier, to compel a settlement of his accounts, as such, if the allegations thereof were sustained by sufficient evidence.

At this point in the consideration of this case, the plaintiff's real difficulty begins. The bill seems to have been prepared in ignorance of any material fact, necessary to be alleged to charge said cashier with any liability whatever; for certainly if such facts had been known to the pleader, they would have been alleged. The only allegation, that can be found in it is, "that several years ago, the defendant was appointed and acted as the plaintiff's cashier;" and this single allegation is sufficient to show, that the plaintiff had the right to sue in a court of equity to settle said accounts, if any remained to be settled, and to charge him with any liability resting upon him, if any such existed. Upon all the other causes of complaint on the part of the plaintiff, if any such there be, the bill is silent; and they are left wholly to conjecture.

It must be borne in mind, that the demurrer to the plaintiff's bill not only raises the question, whether any bill could have been sustained against the said Jeffries, but also whether the plaintiff's bill filed in this case is sufficient to entitle the plaintiff to any of the relief prayed for. If it is, the said demurrer was rightly overruled; if not, it ought to have been sustained. Upon an examination of the bill it is manifest, that it wholly fails to allege, that any of the moneys of the plaintiff, loaned by said Jeffries while acting as its cashier, has not by the borrowers thereof or by the said cashier been repaid; or that the said plaintiff has sustained any loss whatever by the unauthorized loans of any of said moneys; or that the said Jeffries had in any other manner misapplied or

wrongfully used or appropriated any of said moneys, or that he has by any negligent or careless management of the plaintiff's funds caused it to lose a single cent; nor does it allege, that the deficit, which was found to exist during his term as cashier, was caused by any act or default of his; nor does it even allege, when he was appointed to, or retired from the position of cashier of the plaintiff, nor how much money was improperly loaned, nor to whom such loans were made, nor the amounts thereof. The said bill is too vague, indefinite and general in its statements to require the defendant to answer the same; and because, on account of the imperfect character of the bill we are unable to determine, whether any cause of action exists, we are of opinion, that the plaintiff should have an opportunity to amend its bill, if it should be so advised, and can do so, upon which question we express no opinion.

But while we are of opinion, that the said demurrer ought to be sustained, yet we are not able to concur in the opinion of the counsel for the appellants, that a court of equity has no jurisdiction in any suit brought against the said Jeffries to charge him with any liability for any misfeasance while acting as plaintiff's cashier. On the contrary holding, as we do, that Jeffries while acting as such cashier was a trustee for plaintiff and its stockholders, he may be held liable for any intentional misapplication or wrongful appropriation of its funds or for any careless and negligent management thereof, whereby he has caused a loss of any part thereof, and that he may be sued theretor in a court of equity, which is the appropriate tribunal, and be compelled to settle and account for the funds so misapplied, misappropriated or lost. *Thornton v. Thornton*, 31 Gratt. 212; Story Eq. Juris. sec. 460; *Zetelle v. Myers*, *supra*; *Berkshire v. Evans*, *supra*.

For the reasons hereinbefore stated it is adjudged, ordered and decreed, that the said decree of the circuit court of Kanawha county, rendered on the 9th day of January, 1878, be wholly reversed and annulled. And this Court now proceeding to render such decree, as the said circuit court ought to have rendered, it is further adjudged, ordered and decreed, that the said defendant's demurrer to the plaintiff's bill be sustained, and that this cause be remanded to the said

circuit court with leave to the said plaintiff to amend its bill, if deemed proper to do so, and for further proceedings therein to be had; and it is further adjudged, ordered and decreed, that the appellee do pay to the appellant her costs by her about the prosecution of her appeal and *supersedeas* in this Court, in that behalf expended.

THE OTHER JUDGES CONCURRED.

DECREE REVERSED. CAUSE REMANDED.

WHEELING.

MATTHEWS v. HALL'S ADM'R.

Submitted June 27, 1882—Decided April 21, 1883.

(*WOODS, JUDGE, Absent.)

1. If a surety extinguishes the debt of his principal, in whole or in part, for any sum less than the full amount so extinguished, he can in the absence of an express contract recover from his principal only the amount actually paid by him. (p 514.)
2. The implied contract in such case is, that the surety shall be indemnified only, and he will not be allowed to speculate out of his principal; consequently, if a surety obtains a credit on the debt of his principal without pecuniary cost, loss or damage to himself, he will not be entitled to recover anything for procuring such credit, although his principal avails himself of the benefit of such credit and the same is allowed to him by the creditor. (p. 514.)

Appeal from and *supersedeas* to a decree of the circuit court of the county of Lewis, rendered on the 28th day of February, 1879, in a cause in said court then pending, wherein Joseph Matthews was plaintiff, and Abraham R. Hall and others were defendants, allowed upon the petition of said Matthews.

Hon. John Brannon, judge of the sixth judicial circuit, rendered the decree appealed from.

*Cause submitted before Judge W. took his seat on the bench.

the facts of the case are stated in the opinion of the Court.

M. Bennett, for appellant.

William E. Arnold, for appellees.

YDER, JUDGE, announced the opinion of the Court:

This is an appeal from a decree of the circuit court of this county rendered, February 28, 1879, in a suit therein pending in which Joseph Matthews was plaintiff and Abraham R. Hall and others were defendants. The plaintiff filed a bill in said court, in July, 1875, and he alleges therein, that on January 10, 1859, Abraham R. Hall, who had been lawfully elected sheriff of said county, in order to indemnify his securities on his official bond as such sheriff, together with John S. Hall who was to act as his deputy, conveyed to Perry Brannon, trustee, by deed dated January 4, 1860, certain tracts of land, two of one hundred and fifteen and one hundred and forty acres, respectively, lying in said Lewis county, the property of said Abraham R. Hall, and the other of two hundred and thirty-eight acres, lying in Ritchie county, the property of said John S. Hall, which deed after reciting that George J. Arnold, Joseph Matthews, Abraham H. Hall, Ezra Hall and Joseph Hall as sureties, did with said Abraham R. Hall and John S. Hall enter into and acknowledge a bond to the commonwealth of Virginia for the faithful discharge of their duties by the said Abraham R. Hall as sheriff and the said John S. Hall as deputy, conveyed said lands in trust to secure said George J. Arnold and Joseph Hall as such securities from any liability which said principal or deputy might incur by reason of said sheriffalty, if any default should occur the said trustee was authorized to sell said lands to satisfy the same, and the balance of the proceeds of such sale to be held by said trustee "for the indemnity of any or all further liability or liabilities which may arise out of said sheriffalty;" that although the said deed was given to indemnify the said George J. Arnold and Joseph Hall, the plaintiff avers that by the rules of said county it enured to the benefit of all the sureties jointly; that during the term of office of said Abraham H. Hall as sheriff aforesaid, he incurred various liabilities, and amongst

which was a liability to the commonwealth of Virginia amounting to about one thousand eight hundred and thirty-one dollars, with interest thereon from March 26, 1861, at the rate of fifteen per cent. per annum, which involved the plaintiff in the liability as his surety; that on this liability the plaintiff paid two hundred and eighteen dollars and sixty cents to operate as paid June 1, 1861; that said Abraham R. Hall acknowledged said debt to the commonwealth and has paid or settled it, and in said settlement claimed and was allowed the benefit of and credit for the said two hundred and eighteen dollars and sixty cents paid by the plaintiff as aforesaid, but has failed to pay the said sum or any part thereof to plaintiff. The plaintiff, therefore, prays that said trustee be required to sell said trust property to pay said two hundred and eighteen dollars and sixty cents and the interest thereon and for general relief.

The said Henry Brannon, trustee, the said Abraham R. and John S. Hall and their sureties aforesaid were made defendants to said bill, and the said defendants demurred thereto which demurrer was overruled. The said Abraham R. Hall having died intestate, his personal representative and heirs were by bill of revivor made defendants to this suit and served with process. And subsequently, an amended bill was filed against the administrator and heirs of Jonathan Hall in which the plaintiff alleges that said Abraham R. Hall had sold to said Jonathan Hall a large portion of the lands conveyed to Henry Brannon, trustee, as aforesaid and that a part of the proceeds of said lands so sold was applied to the payment of liabilities of said Abraham R. Hall, but that said Jonathan Hall is not entitled to substitution on account of said application of the proceeds of said sale as against the rights of the plaintiff.

Emmet J. O'Brien, administrator of said Jonathan Hall, deceased, filed his answer to said amended bill, in which he denied that the plaintiff had any right to resort to the lands sold by said Abraham R. Hall to his intestate.

The facts in the record show, that the plaintiff, as successor of said Abraham R. Hall, was sheriff of said county from January to July, 1861, and that as such sheriff he paid into the auditor's office of Virginia two hundred and eighteen

and sixty cents in excess of what was charged against in said office. There were two assessors' districts in county in 1861, in one of which G. I. Marsh was commissioner of the revenue and in the other Elijah Flesher was commissioner, the latter was called district No. 1 and the other No. 2. The said Marsh returned to the auditor of Virginia the taxes on licenses assessed by him in his district in the spring of 1861, but the said Flesher made no return of taxes on licenses assessed by him for that year and none was charged on the auditor's books against the sheriff. It is shown, that the plaintiff as sheriff collected at least one hundred and eighty-three dollars on taxes on licenses assessed in Flesher's district. It is, therefore, contended by the defendants that the said over-payment of two hundred and seven dollars and sixty cents claimed by the plaintiff was not money collected by him on license taxes in said district No. 1 and for which he should have been but was not credited by the auditor of Virginia. There is also testimony tending to show that the plaintiff collected fully as much as one hundred and eighteen dollars and sixty cents on license taxes in said district No. 1 for which he has never accounted and has not been charged with by the State of Virginia or this State. It appears, however, from the books of the auditor of Virginia, that the plaintiff, in the manner aforesaid, overpaid the amount charged to him by said sum of two hundred and eighteen dollars and sixty cents, and the claim of the said Abraham R. Hall having been by law transferred to the State of West Virginia, he, the plaintiff, or some one in his behalf, procured the passage of an act by the Legislature of the latter State, on February 1, 1873, allowing as one of the sureties of said Abraham R. Hall credit on the debt due the State from said Hall, for the said sum of two hundred and eighteen dollars and sixty cents—Acts of 1873, p. 76. That afterwards the said Hall, with the concurrence of the plaintiff, in a settlement with the agent of the State, was allowed a credit on his said indebtedness to the State for said two hundred and eighteen dollars and sixty cents and he paid the balance due from him to the State. This transaction is the foundation of the plaintiff's claim to recover in this suit. Is he entitled to recover?

If the surety discharges the debt of his principal in whole or in part for any sum less than the full amount he so discharges, he can, in the absence of an express contract, recover from his principal only the amount actually paid by him—*Blow v. Maynard*, 2 Leigh 29. The implied contract in such case is that the surety shall be indemnified only, and he will not be allowed to speculate out of his principal. If he pays in depreciated bank notes, or other money which is below par, but is taken by the creditor at par, he can recover from the principal only the par value of such money—*Kendrick v. Forney*, 22 Gratt. 748; *Butler v. Butler*, 8 W. Va. 674; *Feamster v. Withrow*, 9 *Id.* 296. He is entitled to recover the amount actually paid by him, and not the amount extinguished by that payment. If he pays nothing he is entitled to recover nothing from his principal. It is on a contract for indemnity that the surety becomes liable for the debt. It is by virtue of that situation, and because he is under an obligation as between himself and the creditor of his principal, that he is enabled to make the arrangement with that creditor. It is his duty to make the best terms he can for his principal. He occupies in that regard the same position as an agent, and cannot speculate out of his principal—*Brandt on Sur. and Guar.* § 182.

What, if anything, has the plaintiff paid as surety for his principal Abraham R. Hall in this case? The enquiry is, what amount will indemnify him for the actual sum he has paid or loss sustained, and not what amount of the debt of his principal he has extinguished. The fact that the plaintiff voluntarily paid money in discharge of a liability, either actual or supposed, to the auditor of Virginia, is *prima facie* evidence, that he was indebted to that State for the amount so paid. If the money was paid by him by mistake the burden was on him to show the mistake and the extent of it. It is not pretended that he made a loan to said State. The most that can be claimed by him is that he made the overpayment of two hundred and eighteen dollars and sixty cents by mistake. Has he shown that there was any error or mistake in said payment? The books of the auditor's office are exhibited to prove that he has been credited with two hundred and eighteen dollars and sixty cents more than he has

been charged with on said books. But said books and the proof in this cause show that what appears to be a mistake in his favor is in fact not such. The taxes on licenses assessed in district No. 1 of Lewis county were not returned to the auditor's office and consequently not charged to the plaintiff. The taxes assessed in this district was, perhaps, over one thousand dollars, and it is proved that the plaintiff collected part of said taxes; and while the amount collected by him is not shown, it sufficiently appears, that he collected at least one hundred and eighty-three dollars in said district and the fact that he paid to the auditor two hundred and eighteen dollars and sixty cents is, in the absence of any evidence to the contrary, conclusive evidence that he collected not less than that sum in said district. It follows, therefore, that he has paid nothing out of his own funds to the auditor, nor has he sustained any pecuniary loss or damage. But it is insisted that the said act of the Legislature of February 1, 1873, is an admission on the part of the State that said two hundred and eighteen dollars and sixty cents was the balance due the plaintiff *for excess of payments* on the spring license taxes for the year 1861. If this act was intended as a release of a claim due the State it is unconstitutional and void. Const. sec. 38 art. VI. And if it was not so intended, it could not affect the rights of the parties and leaves their respective liabilities just as they were before its enactment. But whether this be true or not, is immaterial, as it is not pretended that there was any consideration for said act other than that which has been hereinbefore stated and considered. So in any view of the transaction, it does not appear that the credit allowed the said Abraham R. Hall as aforesaid, although procured by the plaintiff, cost anything or subjected the plaintiff to any pecuniary outlay or loss. He obtained said credit by the payment of money belonging to the State which he has not been called on to refund. If the State should hereafter compel him to pay said two hundred and eighteen dollars and sixty cents he may then have a just claim against his principal and co-sureties, and when he shall have accounted to the State for said money, it will be time enough to consider whether or not he is entitled to any relief against them; but until then he is not entitled to recover. The plaintiff has as

yet sustained no damage, paid no money, nor been subjected to any loss. And not having been damnified he is not in a position to call for indemnity.

I am, therefore, of opinion that there is no error in the decree of the circuit court dismissing the plaintiff's bill, and that said decree should be affirmed with costs to the appellees against the appellant and thirty dollars damages.

THE OTHER JUDGES CONCURRED.

DECREE AFFIRMED.

WHEELING.

WAYT v. CARWITHEN *et al.*

Submitted January 25, 1883—Decided April 21, 1883.

1. A case in which a demurrer to the plaintiff's bill was erroneously sustained. (p. 517.)
2. Any deed or written contract used by the parties for the purpose of pledging real property, or some interest therein, as security for a debt or obligation, which is informal and insufficient as a common law mortgage, but which by its terms shows that the parties intended that it should operate as a lien or charge upon specific property, will constitute an equitable mortgage and may be enforced in a court of equity. (p. 520.)
3. The right to enforce the lien of an equitable mortgage is not lost by the lapse of time, or barred by the statute of limitations, until such time has elapsed as would bar relief upon the instrument creating such lien—the dignity and character of the lien depending upon the nature of the instrument creating it, and not upon the antecedent debt or lien intended to be revived or preserved. (p. 521.)

Appeal from and *supersedeas* to a decree of the circuit court of the county of Kanawha, rendered on the 7th day of April, 1882, in a cause in said court then pending, wherein George Wayt was plaintiff, and N. Carwithen and others were defendants, allowed upon the petition of said Wayt.

Hon. F. A. Guthrie, judge of the seventh judicial circuit, rendered the decree appealed from.

he facts of the case are stated in the opinion of the Court.

H. & J. F. Brown and *Joseph Ruffner* for appellant cited following authorities: Code, Va. (1849) ch. 48 § 12; 3 gh 365; 2 Min. Inst. 882; Perry Trusts, §§ 920, 921; 19 538; Ad. Eq. 55; 14 W. Va. 211; 2 Leigh 6; Ang. a. 312; 6 Munf. 352; 13 W. Va. 718.

George S. Couch for appellee John T. Halliday cited Code (1849) ch. 186 § 12; *Id.* ch. 119 § 1; Freem. Jdgmts. 38; 20 W. Va. 351.

NYDER, JUDGE, announced the opinion of the Court :

This suit was instituted in the circuit court of Kanawha county, on November 2, 1881, by George Wayt against Nancy Carwithen and others. The bill was demurred to, demurrer sustained and the bill dismissed with costs, the plaintiff appealed to this Court.

The material allegations of the plaintiff's bill are, that in 1811, James Carwithen by executory contract purchased of Jesse Mills one hundred acres of land on Davis creek in Kanawha county; that the purchase-money for said land remaining unpaid the said Mills by an action in the circuit court of said county obtained a judgment on June 20, 1856, against said Carwithen for four hundred dollars, the amount of said purchase-money, with interest thereon from March 1851, and costs; that, subsequently, by deed, dated November 13, 1857, the said Mills conveyed said land to said Carwithen which deed was duly recorded in said county the day after its date; that at the request of said Carwithen the plaintiff paid to said Mills four hundred and twenty-four dollars and thirty-four cents, the amount due him from said Carwithen on the aforesaid judgment, and thereupon the said Carwithen, by written agreement, dated February 15, 1858, and duly acknowledged and recorded in said county, assigned the plaintiff to the rights of said Mills in reference to the said land and the lien which said Mills held thereon as vendor, which agreement was made in consideration of the payment of said four hundred and twenty-four dollars and thirty-four cents by plaintiff to said Mills and for

other moneys mentioned therein, but said lien was not to be enforced by plaintiff for four years from the date of said agreement; that afterwards said Carwithen died leaving a widow, the defendant Nancy Carwithen, and two children, John H. and Ellen Carwithen as his heirs at law, and John Slack, jr., became the administrator of his estate; that neither the said James Carwithen nor his representatives have ever paid the plaintiff the said four hundred and twenty-four dollars and thirty-four cents or any part thereof.

The bill further alleges, that on June 2, 1852, *before* the said James Carwithen acquired the legal title to said one hundred acres of land, he executed to J. L. Carr and Isaac Read trustees a trust deed upon his equitable right thereto, and also upon the legal title of another tract of one hundred and fifty acres which had been conveyed to him by John D. Mays in 1851, to secure the payment of two debts, one to E. Baines and the other to Abram Wright; that this trust deed was acknowledged and copied upon the records of said county on the day of its date, but the plaintiff, at the time the aforesaid agreement of February 15, 1858, was executed to him, had no actual notice of said trust deed; that, on July 3, 1860, the said trustees sold said one hundred and fifty acres of land under said trust deed of June 2, 1852, and satisfied the debts therein secured; that, on July 1, 1872, after the satisfaction of the trust aforesaid, the defendant, Nancy Carwithen, widow as aforesaid, claiming that a deed or release had been made to her by one of said trustees and she having a dower interest therein, conveyed her interest in said one hundred acres of land, by deed with special warranty of that date, to Greenbery Slack; that the said Slack, by deed dated July 12, 1872, conveyed the said one hundred acres with general warranty, to John T. Halliday and William Y. Miles jointly; and that said Miles and wife, by deed dated January 31, 1876, sold, quit-claimed and conveyed, their interest in said land to the said John T. Halliday. The bill charges, that no such deed of release as claimed by her was ever executed to said Nancy Carwithen by either of the aforesaid trustees, but if such release was executed it was void; that the legal title to said one hundred acres is vested in the heirs of said James Carwithen, deceased, subject to the

plaintiff's lien aforesaid; that, if it shall be shown that the said Nancy Carwithen acquired the legal title to said land by release from said trustee or otherwise, which is denied, still the conveyance by her of such legal title, and all subsequent conveyances thereof, were subject to the plaintiff's said lien, and that in any event the plaintiff is entitled to have his said lien enforced in a court of equity. The plaintiff, therefore, prays that his said lien may be enforced against said one hundred acres of land and that he may have other and general relief.

The administrator, widow and heirs of said James Carwithen, deceased, and John T. Halliday were made defendants, and the plaintiff exhibited with his bill the aforesaid agreement of February 15, 1858, and made the same a part of his bill. The parts of said agreement necessary to be referred to here are as follows:

"Whereas, the said James Carwithen is indebted to the said George Wayt in the following amounts of money, to-wit: In the sum of four hundred and twenty-four dollars and thirty-four cents, which he has paid to Jesse Mills in discharge of a judgment rendered at the spring term of the circuit court of Kanawha county in favor of said Mills against said Carwithen, and which judgment was for the purchase-money of a tract of land sold by said Mills to said Carwithen, lying upon Davis creek, in the county aforesaid; and also in the further sum of two hundred and sixty-nine dollars and one cent due said Wayt on an open account;" * * *

"and the said James Carwithen being desirous to secure to said George Wayt the payment of the money due as aforesaid, as well as to indemnify and secure said Wayt against all loss or damage which he may sustain by reason of his having become security for said Carwithen in the forthcoming bonds aforesaid, doth hereby covenant and agree that the said Wayt shall be subrogated to the rights of said Mills in reference to the lands aforesaid, and that he may retain the lien which said Mills holds as vendor of said land." * *

"And it is further agreed between the parties that the said Carwithen may sell the property aforesaid at any time he may think proper to do so, provided he pay or secure said Wayt against all claims which he may have against said Car-

withen on account of the moneys paid and liabilities assumed as aforesaid. And the said Wayt further covenants and agrees that he will not enforce the vendor's lien which he has, as assignee of Jesse Mills as aforesaid, for four years from the date hereof, provided," &c.

It is stated in the argument before this Court, that the ground, upon which the circuit court sustained the demurrer to the plaintiff's bill, was that the right to relief stated in said bill was barred by the statute of limitations. In reply to this it is urged here by the appellant, *first*, that, even if it appeared upon the face of the bill that the plaintiff's right to relief was barred, the statute of limitations not having been pleaded, the defendants could not take advantage of such bar by demurrer, and *second*, that the statute of limitations is a defense personal to the debtor and cannot be relied on by another party. Whether these questions are material or not in this cause depends upon the fact, whether or not, taking the averments of the bill as true they show that the relief sought by the plaintiff is barred; and to determine that fact it is necessary to ascertain the nature and character of the plaintiff's claim as alleged in his bill and contained in the agreement exhibited as part thereof. The bill avers that said agreement constitutes an equitable mortgage on the land therein mentioned which he is entitled to enforce in a court of equity. Is such the fact?

A mortgage, or trust deed, which cannot be enforced by a sale under the power or by a judgment of foreclosure, on account of some informality requisite to a complete instrument, will nevertheless be regarded as an equitable mortgage, and the lien will be enforced by proceedings in equity. The attempt to create a security in legal form upon specific property having failed, effect is given to the intention of the parties, and the lien enforced as an equitable mortgage. Any agreement between the parties in interest that shows an intention to create a lien may be in equity a mortgage. *Daggett v. Rankin*, 31 Cal. 321. As stated by Judge Story, "If a transaction resolves itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage." *Flagg v. Mann*, 2 Sum. 486, 533. Effect has been given upon this principle to an instru-

t given by the maker of two notes to his sureties, the s reciting that they were for the purchase of land and iding that in case the maker should fail to pay them, ing him to convey the said land to his said sureties. was held, upon the failure of the maker to pay the notes, e a mortgage in favor of the sureties. *Courtney v. Scott*, Sel. Cas. 457; *Lyon v. Lyon*, 67 N. Y. 250. So an ement on the back of a note, making it a charge upon icular land, is an equitable mortgage. In this way an ement intended to operate as a revival of a mortgage , which had been paid, may be rendered effectual as an able mortgage, although ineffectual to revive the mort- e lien. *Peckham v. Haddock*, 36 Ill. 38. And so an ement in a lease, that the lessor "is to have a lien" upon ain property for the faithful performance of the lessee's gation to pay rent, is in effect a mortgage. *Whiting v. elberger*, 16 Iowa 422. See 1 Jones on Mortg. §§ 162 71.

rom these authorities I conclude that any deed or written ract used by the parties for the purpose of pledging roperty, or some interest therein, as security for a debt bligation, which is informal and insufficient as a common mortgage, but which by its terms shows that the parties ded that it should operate as a lien or charge upon ific property, will constitute an equitable mortgage and e enforced in a court of equity.

nder the law thus considered it is apparent that the ement set out in the plaintiff's bill in this cause contains he requisites of an equitable mortgage. It is in writing, er seal and signed by the parties, and manifests, by its as, an unmistakable intention by the parties thereto to te or preserve a lien on a specific tract of land as security a particular debt. It is contended, however, that the lien ted by said agreement is at most but a judgment-lien, ore than ten years having elapsed it is barred by the te of limitations. I do not regard such as the correct y. It is immaterial whether said debt was a lien prior to date of the agreement or not. In this case there was no in fact, because it was paid off by the plaintiff and the thus paid off could not be revived by the parties. The

language used in the agreement is not very technical or accurate, but there is no difficulty in ascertaining from their language what the parties intended and what they in fact did. They intended that said agreement should operate as a security to the plaintiff for the debt paid by him to Mills; and the extent and character of the security given or the lien thereby created depends, not upon the antecedent debt or lien, but upon the legal qualities of the instrument creating the lien or security. The said agreement, being under seal, the lien created by it could not be affected by the statute of limitations for twenty years from the time the plaintiff's right to enforce it accrued. But it being an equitable lien the statutory bar could only apply, if at all, by analogy, and if the statute does not apply, then it can only be barred by the presumption of payment arising from the lapse of time. So in either event the bar would not apply within less than twenty years from the time the cause of action accrued. The agreement is dated February 15, 1858, and was not, by its terms, to be enforced for four years from its date, and this suit having been brought November 2, 1881, it did not appear, therefore, upon the face of the bill that the plaintiff's right to relief was barred. Such being the fact it becomes unnecessary to decide in this cause, whether or not the statute of limitations can be made available on demurrer or whether any person other than the debtor can plead said statute.

The trust-deed of June 2, 1852, to Carr and Read, trustees, was given upon an equitable title and under our statute, as well as that of Virginia, the recordation of said trust-deed, did not operate as constructive notice to the plaintiff who acquired his lien after the said Carwithen had obtained the legal title. Code of Va., sec. 12 chap. 118; *Hoult v. Donahue*, *supra*.

The agreement giving the plaintiff a lien was duly acknowledged and recorded before the execution of the deed from the widow, Nancy Carwithen, to Greenbury Slack; consequently, the said Slack and all vendees of said land through title derived from him were purchasers with notice of the plaintiff's equitable lien, and hold the land, if they acquired any title whatever, subject to the rights of the plaintiff. Code of Va. sec. 4 chap. 118 p. 566.

For the reasons aforesaid, I am of opinion that the said decree of the circuit court was erroneous and must be reversed with costs to the appellant against the appellee, John T. Halliday, he being the only defendant who appeared in the court below; and this Court proceeding to render such decree as the said circuit court ought to have rendered, it is ordered and decreed that the demurrer to the plaintiff's bill be overruled; and this cause is remanded to the said circuit court with leave to the defendants to answer the plaintiff's bill and for further proceedings to be had according to the principles settled in this opinion and further according to the rules, principles and practice of courts of equity.

THE OTHER JUDGES CONCURRED.

DECREE REVERSED. CAUSE REMANDED.

WHEELING.

NORVELL v. HEDRICK, TRUSTEE, *et al.*

Submitted January 25, 1883—Decided April 21, 1883.

1. Real estate is, by deed, conveyed to a trustee for the sole use of Ruth, the wife of N., with power to said trustee, upon the written request of said Ruth attested by a credible witness, to sell and convey the same in fee simple to any person she may designate by writing as aforesaid. The trustee in pursuance of such written request by Ruth, conveys said real estate by trust-deed to secure the payment of a note executed by said Ruth. **HELD:**

The said conveyance by the trustee under said power operated as a grant from the grantors in the deed creating the use and conferring the power and not as a grant from the usee, the said Ruth; and consequently, said conveyance by the trustee, under said power, operated as a valid conveyance of the *corpus* of said real estate, although neither the said Ruth nor her husband was a party thereto, and the husband did not unite in said written request. (p. 527.)

2. Where usurious interest has been paid and the transaction closed, the borrower may recover back from the lender the excess so paid beyond the legal rate, in an action of *assumpsit* for money had and received; but if the debt or any part of it, on which

21	523
55	118
55	121

such usurious interest has been paid, remains unpaid, a court of equity in stating the account between the parties will credit upon the principal of such unpaid part whatever usurious interest has been paid, and give the lender a decree for his debt with legal interest only. (p. 529.)

Appeal from and *superseas* to a decree of the circuit court of the county of Kanawha, rendered on the 5th day of June, 1880, wherein Ruth A. Norvell was plaintiff, and Charles Hedrick, trustee, and others were defendants, allowed upon the petition of said Norvell.

Hon. Joseph Smith, judge of the seventh judicial circuit, rendered the decree appealed from.

SNYDER, JUDGE, furnishes the following statement of the case:

W. A. Whitaker and wife and A. W. Quarrier, by deed dated June 21, 1862, conveyed certain real estate situate in Charleston, Kanawha county, to Elizabeth Merriam for life with remainder to A. W. Quarrier, trustee, for the sole use of Ruth, the wife of W. G. Norvell, with power to said trustee to sell said real estate in the manner therein prescribed. The provision of said deed creating said trust and power is as follows:

“The reversion (remainder) of the aforesaid real estate and appurtenances to be to A. W. Quarrier as trustee for Ruth, the wife of William Gaston Norvell, of the said county of Kanawha, and to her sole use, benefit and behoof forever, and to and for no other use or purpose whatsoever, with power and authority to the said A. W. Quarrier, trustee as aforesaid, upon the written request of the said Ruth, attested by a credible witness, to have the said real estate, or to sell and convey the same by deed in fee simple to any person that she may designate by the writing aforesaid.”

The said A. W. Quarrier having departed this life, by an order of the circuit court of Kanawha county, made June 8, 1866, W. A. Quarrier was substituted as trustee in his stead in said deed with “all the rights, powers, duties and responsibilities conferred upon said former trustee by the deed aforesaid;” that said W. A. Quarrier, trustee, upon the

on request of said Ruth, the wife of said W. G. Norvell, signed by her and attested by two witnesses, dated January 13, 1871, conveyed to Charles Hedrick, trustee, the said real estate, "in trust to secure to E. Rooke & Co. the payment of a note executed by Ruth A. Norvell, wife of Wm. G. Norvell, to them, for the sum of one thousand five hundred dollars, said note bearing even interest with this deed, and payable one year after date, with interest at the rate of twelve per centum per annum." The deed and written request were admitted to record in the county—the deed upon the acknowledgment of said Ruth and the written request upon a certificate of the privy examination of said Ruth A. Norvell. The said Chas. Hedrick, trustee, advertised said real estate to be sold on July 27, 1877, under said trust-deed to him, for the payment of the debt therein secured; and thereupon the said Ruth A. Norvell exhibited her bill in the circuit court of Kanawha county, and on July 28, 1877, obtained an order of injunction restraining the said Chas. Hedrick, trustee, and all persons from selling said real estate under said trust-deed without the further order of said court. She made defendants in her bill the said Chas. Hedrick, trustee, her husband, the said W. G. Norvell, and E. Rooke and Elijah Norton parties against whom she was suing the firm of E. Rooke & Co. and subsequently, by order of the court, W. A. Quarrier, trustee, was also made a defendant. The plaintiff, after setting out in her bill that she was a married woman living with her husband, set out in detail the foregoing facts, charges therein that she is injured and believes the said trust-deed to said Hedrick, trustee, is of no effect, either in law or equity, to bind her separate estate; that, neither she nor her husband being parties thereto, it does not convey either the legal or the equitable title of said real estate; and that no sale can be made thereunder by said Hedrick, trustee; that the provision of said deed for the payment of twelve per centum per annum as interest on said debt of one thousand five hundred dollars is usurious, and she is not by law required to pay such interest, but which the said E. Rooke & Co. are attempting to collect by the sale of said real estate; that she and her husband have made payments on said debt for which no credits

have been given but the dates and amounts of said payments she is not able to state. And she prays, that said trust-deed to said Hedrick, trustee, may be declared void so far as it affects her; that, if it can not be so declared, then she asks that an account may be ordered to ascertain the true amount due the said E. Rooke & Co. after deducting all credits and usurious interest upon said debt; that said E. Rooke & Co. and said Hedrick, trustee, may be enjoined from further proceedings under said trust-deed by sale or otherwise; and for general relief.

The said E. Rooke & Co. filed their answer to said bill in which they admit the facts stated by the plaintiff, but deny that said trust deed to Hedrick, trustee, is illegal or invalid as to the plaintiff. They admit the payment of the interest on their said debt at the rate of twelve per cent. per annum up to January 13, 1875, and aver that the loan of said one thousand five hundred dollars was made at the special request of the plaintiff; that she used the same for the erection of a store house which she built on said real estate at a cost of one thousand five hundred dollars, and the same is a valuable addition thereto; and that when said loan was made they took from the plaintiff her note which they still hold, and that at that time money was worth and freely borrowed in Kanawha county at from twelve to fifteen per cent. per annum. To this answer the plaintiff replied generally. The bill was taken for confessed as to all the other defendants.

On December 5, 1878, the defendants, E. Rooke & Co., moved said circuit court to dissolve the plaintiff's injunction which motion the court overruled and referred the cause to a commissioner, who subsequently reported that the payments made on said trust debt were by agreement applied at the time of payment to the discharge of the interest thereon at the rate of twelve per cent. and that after deducting all payments at said rate of interest there remained of the principal of said debt on February 21, 1875, one thousand four hundred and eighty-three dollars and ten cents which with the interest thereon from said date to May 21, 1879, at six per cent. amounted to one thousand eight hundred and sixty-one dollars and twenty-nine cents. But calculating the interest on said debt for the whole time at six per cent. and

deducting the payments at their respective dates, the unpaid balance due thereon was on May 21, 1879, one thousand three hundred and seventy-three dollars and ninety cents.

The cause was again heard on June 5, 1880, and on that day the court, being of opinion that said sum of one thousand three hundred and seventy-three dollars and ninety cents was the proper balance due on the said trust debt, decreed that the plaintiff's injunction be dissolved; that the plaintiff pay to the defendants, E. Rooke & Co., the sum of one thousand four hundred and forty-one dollars and eighty-seven cents being the principal of said balance of one thousand three hundred and seventy-three dollars and ninety cents and interest on the principal thereof from May 21, 1879, to the date of the decree; and ordered that unless the said debt should be paid within thirty days, the said real estate should be sold by a commissioner for one fourth cash and the residue upon a credit of six, twelve and eighteen months. From this decree the plaintiff Ruth A. Norvell obtained an appeal and *supersedeas*.

S. A. Miller for appellant.

Charles Hedrick for appellees cited the following authorities: 13 W. Va. 684; Code Va. (1860) 571; Code 448; 9 Leigh 207; 11 W. Va. 123; 5 Leigh 478; Code Va. (1860) p. 625 § 8.

SNYDER, JUDGE, announced the opinion of the Court:

It is claimed by the appellant, that the trust-deed of January 13, 1871, from W. A. Quarrier, trustee, to Chas. Hedrick, trustee, did not operate as a conveyance of either the legal or equitable title to the real estate therein described; because neither she nor her husband is a party thereto, nor was it signed or acknowledged by either; and because she being a married woman and her husband not having united in the written request, her privy examination and acknowledgment of said request are of no effect as to her.

These objections rest, evidently, upon a misapprehension of the law and the facts in this cause. The legal title to the property was not vested in Mrs. Norvell. She was merely

the equitable owner, and the deed, which conferred upon her the use, also prescribed the mode and manner of disposing of the property. The person who made the grant and created the power had the right to impose upon them such terms and ceremonies in regard to the disposition of the property, not inconsistent with legal principles, as he thought proper. He thought proper in this instance to confer authority upon the trustee to sell and convey the property upon the written request of Mrs. Norvell attested by a credible witness. The husband is not mentioned in this power nor does it require the request to be acknowledged in any form by Mrs. Norvell. All that is required is that the wife shall make the request in writing and that said writing shall be witnessed by a credible person. When this form is complied with the power and authority of the trustee to convey is absolute. The exercise of this power by the trustee operated as a grant from Whitaker and Quarrier, the original grantors, and not as a grant from the wife; and, therefore, no privy examination, joinder of the husband or other formality, not mentioned in the deed creating the power, was necessary. *Iee v. Bank of U. S.*, 9 Leigh 200.

The said trustee having thus the power to dispose of the *corpus*, and having disposed of it in the precise mode prescribed by the deed creating the power, the said deed of January 13, 1871, to Chas. Hedrick trustee operated as a valid conveyance of the fee for the purposes therein mentioned. *Woodson v. Perkins*, 5 Gratt. 345.

It is further claimed by the appellant that it was error to decree a sale of the said real estate without first ascertaining by proper reference whether the rents and profits would not in a reasonable time pay the said trust debt of E. Rooke & Co. The appellant never asked for any reference or made any objections to the sale on this ground in the court below; and, therefore, without considering whether such objection, if properly made, could avail in a case where it is sought to enforce the lien of a trust deed, this objection must be overruled. This Court has repeatedly decided that no such objection can be made for the first time in this Court. *Hill v. Morehead*, 20 W. Va. 429; *Rose v. Brown*, 11 *Id.* 123.

This disposes of all the grounds of error assigned by the

appellant; but it is insisted by the appellees, E. Rooke & Co., that the circuit court erred in not allowing them the twelve per cent. interest so far as it had been actually paid.

It is shown by the record that seven hundred and twenty dollars was paid on the said trust debt of one thousand five hundred dollars, which by agreement at the times of payment was applied in discharge of interest thereon for four years at the rate of twelve per cent. per annum; that five hundred and forty dollars of said seven hundred and twenty dollars was paid January 13, 1874, and one hundred and eighty dollars the residue on January 26, 1875. If we treat this as a bill filed under our statute the lenders, E. Rooke & Co., can recover their "principal money with six per cent. interest only." Sec. 7, ch. 96 Code p. 533. If, however, the excessive interest shall be regarded as having been paid and the borrower is now seeking to recover it back—the statute not applying to such case—the result would still be the same; because under the general rules of law a party who has paid usurious interest may recover it back from the lender in an action of *assumpsit* for money had and received. *Browning v. Morris*, 2 Cowp. 790. And, in a court of equity, where an excessive interest has been paid, but the debt or some part of it yet remains unpaid, such court, in stating the account between the parties, will allow credit upon the principal for whatever usurious interest had been paid. Tyler on Usury 448; *Parmelee v. Lawrence*, 44 Ill. 405; *Spengler v. Snapp*, 5 Leigh 478; *Davis v. Demming*, 12 W. Va. 246, 278. The circuit court did not, therefore, err in crediting on the debt of E. Rooke & Co. the usurious interest paid by the appellant as interest on said debt.

For the reasons aforesaid, I am of opinion that the said decree of the circuit court of June 5, 1880, must be affirmed with costs to the appellees, E. Rooke & Co., against the appellant and damages according to law. And this cause is remanded to said circuit court for further proceedings, to be had therein according to the principles, rules and practice of courts of equity.

THE OTHER JUDGES CONCURRED.

DECREE AFFIRMED. CAUSE REMANDED.

WHEELING.

RIDDLE v. CORE.

Submitted August 10, 1882—Decided April 21, 1883.

(*WOODS, JUDGE, Absent.)

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| 21 | 530 |
| 34 | 172 |
| 91 | 530 |
| 42 | 771 |
| 21 | 530 |
| 52 | 655 |
| 21 | 530 |
| 56 | 510 |
1. Where in an action of covenant for breach of warranty of title the declaration sets out the making of the deed and the general warranty of title therein contained, and no plea of *non est factum* is pleaded, but the only pleas are "covenants performed" and covenants not broken, the making of the deed and the warranty are admitted by the pleadings, and no proof thereof is necessary. (p. 533.)
 2. On a demurrer to evidence the only question for the consideration of the court is, whether the evidence supports the issue. (p. 533.)
 3. After joinder in the demurrer the general practice is for the jury to assess conditional damages. (p. 533.)
 4. A new trial, in such a case, because the verdict is excessive, can as in other cases only be had upon *motion*, as the court is not bound *ex mero motu* to grant a new trial. The Appellate Court cannot grant a new trial without such motion in the inferior court. (p. 533.)

Writ of error and *supersedeas* to a judgment of the circuit court of the county of Ritchie, rendered on the 2d day of November, 1881, in an action at law in said court then pending, wherein Eleven Riddle was plaintiff, and Andrew S. Core was defendant, allowed upon the petition of said Core.

Hon. Thomas J. Stealey, judge of the fourth judicial circuit, rendered the judgment complained of.

The facts in the case are stated in the opinion of the Court.

W. L. Cole and *W. U. Miller* for plaintiff in error.

P. W. Morris for defendant in error cited the following authorities: 10 W. Va. 546; Douglass 218, 224; 3 Tuck. Com. 290, 291; 2 Campbell 519; 2 Greenleaf (2d ed.) 223; 1 Chitty 482; 2 Starkie (7th ed.) 342-3; 6 Munf. 322; Code

*Case submitted before Judge W. took his seat on the bench.

633; 6 W. Va. 508; 8 W. Va. 515, 605; Rob. Forms 99; 1 Saunders (5th ed.) 1103; Bullers N. P. 314; 2 H. Bl. 208.

JOHNSON, PRESIDENT, announced the opinion of the Court:

In the circuit court of Ritchie county at June rules 1881 the plaintiff, Eleven Riddle, filed his declaration in covenant against A. S. Core, claiming damages for breach of warranty of title to a tract of two hundred and seventy-five acres of land. The declaration contains six counts varying but little from each other. It alleges the making of the deed, the consideration therefor, four hundred dollars, the covenant of general warranty, which is set out in the declaration, the breach of the covenant by the eviction of the plaintiff from the land so purchased, by judicial proceedings, and the claim for damages. The defendant demurred to the declaration, which was overruled, and he thereupon pleaded "covenants performed," and "covenants not broken." After the plaintiff had introduced his evidence the defendant, by counsel, demurred to the evidence, thereupon the jury rendered a conditional verdict for six hundred and sixty-five dollars and sixty-eight cents.

On the 2d day of November, 1881, judgment was rendered upon the demurrer to the evidence in favor of the plaintiff, and for the amount of the verdict with interest from date of judgment. To this judgment the defendant obtained a writ of error. The defendant in error here insists, that there was no demurrer to the evidence in the case. In this he is clearly mistaken as the order showed, that the defendant demurred to the evidence, and that the plaintiff joined therein, and a demurrer accompanies the certified record, which we must presume is the identical demurrer filed.

The first error assigned is to the overruling of the demurrer to the declaration. No grounds are assigned for this error, and we see none on inspection of the declaration; the demurrer was therefore properly overruled.

It is also assigned as error in the court deciding the demurrer for plaintiff, that there was no evidence tending to show, that the land mentioned in the record of eviction is the land mentioned in the declaration. This assignment is not insisted upon nor even mentioned in the argument for

plaintiff in error. A jury would certainly have been justified in inferring, at least from the evidence, that it was the same land. But it is insisted here in argument, that the demurrer should have been decided in favor of plaintiff in error, because the deed containing the warranty for breach of which the action was brought was not introduced in evidence. This is true, if under the pleadings in the case the plaintiff could not succeed without proof of that material fact. But was the plaintiff under the pleadings called upon to prove the covenant? Did his pleas admit the covenant sued upon?

Mr. Greenleaf, 2 Ev. § 233, says, "in covenant by the common law there is *no general issue* or plea, which amounts to a general traverse of the whole declaration, and of course obliges the plaintiff to prove the whole; but the evidence is strictly confined to the particular issue, raised by a special plea." In § 234 he says, "if the deed is not put in issue by the plea of *non est factum*, the defendant by the rules of the common law is understood to *admit so much of the deed as is spread upon the record.*"

In *Williams v. Sills*, 3 Campbell 519, the action was *covenant* for not keeping premises in repair. The only pleas were performance and a *license*. For the purpose of showing the words of the covenant more fully than they were stated in the declaration, the plaintiff's counsel put in the deed, which they contended they had the right to introduce without proving it by the subscribing witnesses, there being no plea of *non est factum*. Lord Ellenborough said: "The defendant by refraining from the plea of *non est factum* has only admitted so much of the deed as is expanded upon the record, and if the plaintiff would avail himself of any other part of the deed, he must prove it by the attesting witnesses in the common way. I know not at present, that the instrument produced was ever executed by the defendant, although it partly agrees with that which the plaintiff has declared upon." By not pleading *non est factum* in this case, and pleading covenants performed, the defendant admitted the deed and covenant therein as set out in the declaration; that is he admitted the making of the deed as it is therein set out and the covenant of "general warranty" therein contained. The deed is very

set out in the declaration, even to the description of the therein conveyed by metes and bounds. It being thus admitted by the pleadings it was not necessary for the plaintiff to prove it.

The only other error complained of is, that the judgment is for too large a sum. The judgment was according to the finding of the jury. No motion was made to set it aside. In *Phrey's administrator v. West's administrator*, 3 Rand. 516, the court held: "That the only question for its consideration on a demurrer to evidence is, whether the evidence supports the issue or not; and the judgment is, that it does or does not support it. After the demurrer is joined the jury may be discharged, and if the judgment be, that the evidence does support the issue, a writ of enquiry of damages is granted, or the jury then empaneled, may assess conditional damages." But in either case the question of damages is left to the jury, not with the court; subject as in all other cases to the supervising control of the court to grant a new trial in case the damages are excessive. That however rests with the court before whom the trial was had, and that too on a motion to that court for a new trial; there being no case, in which that court is bound *ex mero motu*, to grant a new trial and subject the defendant without his consent to greater damages. The appellate court will not grant such new trial, for that would be to reverse the judgment of an inferior court on a motion for a new trial here, which was not made to that court, and of course on a matter in which that court, committed no error. The law as thus laid down has never been questioned in Virginia or in this State. The general practice now is, when there is a demurrer to the evidence and joinder therein, for the jury at once to assess conditional damages; and for the court upon granting the demurrer, if it finds the law for the plaintiff that the evidence supports the issue, to enter up judgment for the amount found by the jury; but if otherwise judgment is for the defendant. This Court cannot look to the demurrer to the evidence to see whether the damages assessed by the jury were excessive, in the absence of a motion made in and overruled by the trial court to set aside the verdict and grant a new trial.

The evidence in this case supports the issue, and the demurrer was rightly decided, and judgment was properly rendered for the amount of damages assessed by the jury. The judgment of the circuit court is affirmed with costs and damages according to law.

JUDGES GREEN AND SNYDER CONCURRED.

JUDGMENT AFFIRMED.

WHEELING.

VARNER v. MARTIN.

Submitted June 13, 1882—Decided April 21, 1883.

(*WOODS, JUDGE, Absent.)

1. Under our Constitution private property can not be taken with or without compensation for *private* use. (p. 548.)
2. Under our Constitution private property can be taken only for *public* use, and then only upon just compensation being paid or secured to be paid. (p. 551.)
3. Whether private property should be taken for the direct and immediate use of the public is a question for the Legislature to determine, and when so taken and used, the title of the property condemned is not transferred to a private individual or corporation, but remains in the public directly. The courts can not sit in judgment upon the public exigencies, which demand this exercise of the right of eminent domain; this being in such case solely a question for the Legislature. (p. 552.)
4. Hence a public highway under the direct control of the public, and kept in repair by it, and which no individual can obstruct without being liable to punishment, may if the Legislature by law so authorize, be established, though it leads only from a public road to the dwelling or farm of a single person. If the power conferred on a county court to open such public highway be general, no limitation of this power will be placed by the courts because of the degree of accommodation, which such public road may afford to the public at large. That is a matter in such case, which addresses itself not to the authority, but to the discretion of the county court. (p. 553.)

*Case submitted before Judge W. took his seat upon the bench.

that if the title and control of the property to be condemned is to pass into the hands and under the control of a private person or corporation, so that they are to have it as their private property, whether the public is to have such a use of or in such property as will justify this exercise of the power of eminent domain, is a question for the courts to decide. Though if a particular use of it be declared by the Legislature to be a public use, the courts will hold such use to be public unless it manifestly appears, that it is not a public use. In such cases, what is a public use, is a question for the courts to determine. (p. 555.)

such a case, where the title and control of the property to be condemned is in private hands or in a corporation, three qualifications are necessary to impose upon it such a public use as will justify the taking of such private property without the consent of the owner. (p. 556.)

the use, which the public is to have of such property, must be fixed and definite. The general public must have a right to a certain definite use of the private property on terms and for charges fixed by law; and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice, that the general prosperity of the community is promoted by the taking of private property from the owner and transferring its title and control to another, or to a corporation to be used by such other or by such corporation as its private property uncontrolled by law as to its use. Such supposed indirect advantage to the community is not in contemplation of law a public use. (p. 556.)

is use of the property, which in such case the public must have, must be a substantially beneficial use, which is obviously needful for the public to have, and which it could not do without except by suffering great loss or inconvenience. (p. 557.)

and when the title of property is thus transferred by condemnation to an individual or to a corporation, the necessity for such condemnation must be obvious. It must obviously appear from the location of the property proposed to be condemned, or from the character of the use, to which it is to be put, that the public could not without great difficulty obtain the use of this land or of other land, which would answer the same general purpose, unless it was condemned. And in such case, the courts will judge of the necessity for confirming such condemnation. (p. 558.)

road must be deemed to be a private road, when its control is not under a public officer, and the public is not bound to work it or keep it in order, and where an individual might obstruct its use without being guilty of any public offense. (p. 560.)

the Legislature can not authorize the condemnation of land to

establish such private road, even though the general public welfare of the community might be promoted by the forcible opening of such private roads. On the principles above laid down the public have no such direct and tangible use of such roads, as would justify the courts in regarding it as a public use, even though the public might have a right to use such private road, while it was permitted to be kept open, or while the person for whose use it was opened chose to keep it in repair. (p. 561.)

12. Section 44 of chapter 194 of the Acts of 1872-73, which is taken from sec. 38 of ch. 43 of the Code of West Virginia authorizes the condemnation of lands to establish such private roads, and it is therefore unconstitutional, null and void. (p. 564.)

Writ of error and *supersedeas* to a judgment of the circuit court of the county of Harrison, rendered on the 6th day of June, 1881, dismissing a *supersedeas* to a judgment of the county court of said county in an action wherein A. J. Varner was plaintiff, and Lehi Martin was defendant, allowed upon the petition of said Varner.

Hon. A. B. Fleming, judge of the second judicial circuit, rendered the judgment complained of.

GREEN, JUDGE, furnishes the following statement of the case :

Lehi Martin filed his petition in the county court of Harrison county stating, that he owned a valuable tract of eighty-nine acres on the right hand fork of Jacob's run, to which he had no access by road public or private rendering it thus almost valueless to him; that a road about a quarter of a mile in length could be made to it, connecting it with a public road at a point near A. J. Varner's residence; that such proposed road would pass only through the lands of Varner and one John C. Isenhardt. He asks, that they may be made parties defendant to the petition; that this road be opened, and that it may be a private road with gates where necessary, and that the court will appoint three commissioners, whom he names to view it and report the advantages and disadvantages of the same to the parties to this petition as well as to the public; and all the necessary facts in reference to it; and whether it would be necessary to take any yard, garden or curtilage or any part thereof, or injure or destroy any

ilding; the names of the land owners, whose property
ould be taken or injured; which of them require compen-
ion, and the probable amount to which each of them may
entitled; and the petition asks, that these viewers return
h their report a map of the route of the road.

These viewers were appointed by the court on June 14,
80, the order says on motion of Lehi Martin, who were
ected "to view and make a way for a private road, begin-
g at the public road at or near the dwelling-house of A.
Varner on Jacob's run, and running through the lands of
J. Varner and John C. Isenhardt to a point on the land of
hi Martin, and make report to the court on June 16, 1880,
ording to law." No reference is made in this order to the
ition of Martin. They made their report accordingly, and
court on June 17, 1880, ordered Varner and Isenhardt to
notified to appear on the first day of the next term to show
use against the establishment of this road.

These viewers reported, that in making this road it would
be necessary to take any yard, garden or any part thereof
Varner's land, though it does pass near two small apple
es out of ten recently planted, nor would the road injure
destroy any building on his land or on the land of John
Isenhardt, nor does it take any yard, garden or orchard or
y part thereof on his land; and these are the only land
ners on the proposed road. The proposed width of the
d is twelve feet; its length through Varner's land is eighty-
e and one half poles, and through Isenhardt's land its length
twenty-four and one half poles. Isenhardt claimed no dam-
s. Varner claimed one thousand dollars, but the viewers
mate his damages at twenty-five dollars. They state, that
road will not cut up his fields nor throw them into irreg-
r shape, as it follows through his land a fence already
lt, and only two gates will be necessary on his land if
es are used. A diagram is returned with this report,
ich concludes: "This proposed road we deem absolutely
essary to enable Lehi Martin to obtain the use or benefit
the tract of land of about ninety acres to which it leads,
this road will be of no advantage to the public except as
nables Mr. Martin to have ingress and egress to his land,
it will thus be of great advantage to him."

On the 14th of August, 1880, after the return of this report this order was made by the court:

"This day came the applicant, Lehi Martin, by his attorney, and the contestant, A. J. Varner, in person, and the court having seen and inspected the report of the viewers, to which there were no exceptions, and having heard the evidence adduced, are of opinion that the road, as viewed and marked in the plat and report of said viewers filed in this cause, is necessary to enable the said Lehi Martin, the applicant, to reach and enjoy his own property, and that the grading of the same will not render any additional fencing necessary.

"And it further appearing to the court that John C. Isenhardt, the other land owner through whose land said road passes, requires no compensation and does not object thereto, and that the sum of twenty-five dollars, the damages assessed by said viewers, is a just compensation to said Varner for the land proposed to be taken for said road, it is therefore ordered that a private road through the lands of said Varner and Isenhardt, as viewed and marked out by said viewers and laid down on the plat filed with and accompanying their report in this cause, be granted the said applicant his heirs and assigns upon the payment to the said Varner of the sum of twenty-five dollars, the damages assessed as aforesaid, but upon this condition further, that said applicant shall erect and keep in good repair four gates on said road at the points on the plat filed by said viewers, designated by the letters 'A' and 'B,' 'C' and 'D,' and that the said applicant pay the costs of this proceeding and the expense attending the opening of said road."

And on the same day this order was entered:

"Lehi Martin, the applicant, this day paid into court with the consent of the court, (\$25) twenty-five dollars, the damages assessed by the viewers and fixed by the court as compensation to him for the land proposed to be taken and for damages for the private road granted said Martin through the land of the said Varner and Jno. C. Isenhardt, said Varner refusing to accept the same when tendered him by the said Martin. And the said Varner moved the court to award a writ of *ad quod damnum*, which motion for said writ is by the

court overruled, to which ruling of the court—refusing to grant the writ of *ad quod damnum*—the said Varner excepts and tenders his bill of exceptions, which is signed, sealed and made a part of the record.”

The bill of exceptions was accordingly taken and signed and sealed by the members of the court. A. J. Varner obtained a writ of error and *supersedeas* to this order of the county court establishing this road. The circuit court of Harrison county on the 6th day of June, 1881, affirmed the judgment of the county court and ordered, that the plaintiff in error, Varner, do pay to the defendant in error, Martin, his costs in that court expended. Upon the petition of A. J. Varner a writ of error and *supersedeas* has been awarded him to this order of the circuit court of Harrison county.

Stuart & Blair for plaintiffs in error cited the following authorities: Cons. of W. Va. art. 3 §§ 9, 10, 13; 4 Ohio St. 497; 7 W. Va. 191; 24 Wis. 89; (S. C. 1 Am. Rep. 161); 17 W. Va. 812; 43 Ind. 455; (S. C. 13 Am. Rep. 399, note 404); 66 N. Y. 569; (23 Am. Rep. 86); 44 Vt. 648; (S. C. 8 Am. Rep. 398); 35 Mich. 333; (S. C. 24 Am. Rep. 564); 3 Yeager, 41, 52; *Clack v. White*, 2 Swan. 540; 4 Cold. 419; 4 Ohio St. 253; 7 *Id.* 2 pt. 111; 39 Ill. 110; *Crear v. Cropley*, 40 Ill. 175; 2 Johns. Ch. 463; S. C. 7 Am. Dec. 548; 17 Ohio 340; 9 W. Va. 703; 5 W. Va. 57; Acts 1872-3, ch. 194, §§ 35 to 44 inclusive; Cons. of U. S. art. 7 of Amendments. •

John J. Davis for defendant in error cited the following authorities: Acts 1872-3, ch. 194 § 35; *Id.* § 37; *Id.* § 39; *Id.* § 44; *Id.* § 38; 3 Paige Chy. 45; 1 Sax. Chy. 694; 2 Kent. Com. 13; Potter's Dwar. Stat. 395; 3 Leigh 675; 5 Gratt. 265; 7 W. Va. 191; 4 Har. 580; 9 Ga. 37; 12 Bush. 21; 108 Mass. 202; 42 N. H. 348; 18 N. J. Eq. 54; 2 Nott & McC. 526; 16 Pa. St. 15; 77 Pa. St. 39; 84 Pa. St. 90.

GREEN, JUDGE, announced the opinion of the Court:

The question in this case is, whether on the facts appearing in the record the county court of Harrison rightfully condemned the land of the plaintiff in error, A. J. Varner, to establish the road through it which they did establish by

the order of August 14, 1880. Several objections are urged by the counsel of the plaintiff in error to the manner, in which this condemnation was made, such as that the viewers were appointed not on the petition of the applicant for this private road, but on his motion only; and that after the approval of the report of the viewers the plaintiff in error asked a writ of *ad quod damnum* to assess his damages, which the court refused to grant him, and fixed his damages themselves as the amount reported by the viewers, without giving him his constitutional right to have them ascertained by a jury of twelve freeholders. But underlying these questions is the far more important one, whether under our Constitution and laws upon the facts appearing in this case, could this road have been established, even if the proceedings had been in all respects regular, and the legislation as to the modes of proceeding had been entirely unobjectionable.

The determination of this question will depend upon the constitutionality of section 44 of chapter 194 of the Acts of 1872-73, pages 575 and 576 which is: "Upon hearing the parties interested in an application for a private road, the court shall grant such private road if it be made to appear, that the same is necessary to enable the applicant to reach and enjoy his own property, and that the granting thereof will not entail irreparable injury upon the party through whose lands the same will run. If the granting of such road shall render any additional fencing necessary, it shall only be granted upon condition, that the applicants shall at his own expense build and keep in good repair all such fences for such length of time as he shall use such private road. And upon the payment of the damages assessed therefor, and the completion of the fences aforesaid, if any, the applicant, his heirs or assigns shall have the free use and enjoyment of the said private road to the same extent as if it were a public road, so long as he and they shall comply with the conditions, if any, upon which it was granted."

This section is a copy of the last half of section 38 of chapter 43 of Code of West Virginia page 275 excepting, that it confers the power of establishing such private road on the county court in lieu of the board of supervisors, which had been abolished. And this provision in our Code with refer-

to the establishment of private roads, as well as all provisions in chapter 43 of the Code of West Virginia in reference to private roads and the modes of proceeding to have them established, were for the first time adopted by this State when the Code of 1868 went into operation. Neither the State of Virginia nor this State had ever, prior to that time, adopted any law authorizing the establishment of private roads by public authority. It was an innovation which had been the long continued legislative policy of the State of Virginia and of West Virginia, and was taken from the policy, which had been for a long while adopted in certain Northern States. All the provisions of the Code of West Virginia in reference to private roads, contained in chapter 43 of said Code relative to private roads are transferred to chapter, 194 of the Acts of 1872-73, except that the provisions with reference to private roads contained in the Code of West Virginia are transferred to the county court without change or alteration. But this chapter 43 of the Code of West Virginia, which for the first time introduced in this State any provisions with reference to private roads, was revised, amended and re-enacted by chapter 14 of the Acts of 1881. See session Acts of 1881 p. 152. And in this enactment all the provisions of chapter 43 of the Code of West Virginia in reference to private roads, were omitted, thus in this respect restoring the law to what it had always been prior to our Code, both in this State and Virginia. Is this section 44 of chapter 194 of Acts of 1872-73 p. 575, in violation of our Constitution? This private road was established by virtue of this section, and if it be unconstitutional and void the judgment of the county court of Harrison August 14, 1880, should have been reversed and set aside by the circuit court. But that court having affirmed it, the judgment of the circuit court must be reversed by this Court, when had all the provisions of chapter 194 of Acts 1872-73 been fully complied with. And therefore, if this forty-fourth section of this act be unconstitutional, it is unnecessary to enquire into the regularity of the proceedings in this case. Whether this nor any other legislative enactment should be declared unconstitutional and void unless it be clear, that the Legislature has transcended its authority.

In some cases it has been said, that before the courts declare an act of the Legislature void it should be shown to be unconstitutional *beyond all reasonable doubt*. Perhaps this really means no more than we have said, that before declaring an act of the Legislature void its unconstitutionality should be *clear* to our minds. But the use of this phrase *beyond all reasonable doubt* seems to me to be very inappropriate in such a connection, and to be well calculated to produce mischief. It is a phrase which has long been appropriated to express the character of the evidence necessary to convict a criminal, and has so often in this connection been perverted from its proper meaning by counsel defending criminals, that it is almost impossible to prevent its making a false impression on the mind when it is applied to other subjects, to which the phrase as so used is inappropriate. Perhaps no harm results or at least no very serious harm from the overstrained meaning given to this phrase by criminal lawyers; all the harm resulting in such case is, that now and then by perverting the true meaning of this phrase a criminal is acquitted, who should have been condemned. However this cannot be regarded as a very great evil when it is borne in mind, that it has been said, that it is better that ninety-nine guilty persons should escape than that one innocent person should be condemned. But not so with the question before us. It is not better, that the Constitution should be violated ninety and nine times by the Legislature than, that the courts should erroneously hold one act of the Legislature unconstitutional. We cannot raise presumptions in favor of legislative infallibility as strong as those of a jury in favor of the innocence of a prisoner charged with murder.

The framers of our Constitution presumed, that the Legislature might err in transcending its constitutional powers, and hence they inserted in the Constitution limitations on their powers, which it is the duty of this Court to see are observed. These provisions have been inserted in our Constitution for protection of the life, liberty and property of the citizens against encroachments, intentional or otherwise. We cannot believe that it is our duty to raise presumptions against the citizens and in favor of the Legislature to the extent, that a jury in trying one for murder raise presumptions

in weighing the evidence in favor of the accused. We admit, that it is our duty not to hold void an act of the Legislature unless we are satisfied, that it is clearly unconstitutional. But if after approaching the question involved in this case with great caution and delicacy, as is our duty, and if after a careful examination we are satisfied, that this section 44 of chapter 194 Acts 1872-73 is *clearly* unconstitutional, it is our duty to unhesitatingly so declare, and we would not be properly discharging our duty if after reaching this conclusion we should resort to unnatural constructions either of the Constitution or of the law, on which to base a doubt whereby the law might be upheld, as a jury might do if one was being tried for murder. In no other manner can we properly perform the duty, which to a certain extent is imposed on us of protecting and preserving the inalienable rights of the citizens. While we concede, that it is the duty as it doubtless is the pleasure of both the legislative and the judicial departments of the government to presume, that the other will keep within the bounds of constitutional authority, yet, that presumption is not only not conclusive, but it is not so strong as to prevent a free and full enquiry into the subject; nor should we in the indulgence of this presumption forget that there is committed to us, equally with the legislative department of the government, the trust of guarding and protecting the life, liberty and property of the citizens as guaranteed by the Constitution. My views on this question are well expressed by Judge Stone in the case of *Sadler v. Langham*, 34 Ala. p. 321, 322.

The main question in this case brings up the interpretation to be given to the ninth section of article 3 of our Constitution, our bill of rights, which is: "Private property shall not be taken or damaged for public use without just compensation, nor shall the same be taken by any company incorporated for the purposes of internal improvement, until just compensation shall have been paid or secured to be paid to the owner; and when private property shall be taken or damaged for public use or for the use of such corporation, the compensation to the owner shall be ascertained in such manner as shall be prescribed by general laws. Provided, that when required by either of the parties such compensa-

tion shall be ascertained by an impartial jury of twelve freeholders." See Acts of 1872-73 pages 6 and 7. First, what is meant in this section by the words "for public use?" Second, in what manner and by whom is it to be determined whether the proposed use, for which the property is to be taken, is "a public use?" Third, the prohibition being express only against taking the property of another for "public use," can such property be taken for "private use?" There is much conflict among the authorities upon the first and second of these questions.

This section tacitly recognizes the right of eminent domain. This right attaches as an incident to every sovereignty, and it constitutes a condition, upon which all private property is held. Whenever the public use of property requires it, the private rights to property must yield to this paramount right of sovereign power to take it for the public use. When so taken it is the character of the use, for which the property is taken and not the means or agencies by which it is taken, which determines the question whether it is legally taken under the legitimate exercise of this right of eminent domain. This right may be exercised directly by the statute or by agencies appointed by it, or as is the most common mode, by persons or corporations authorized by the Legislature to exercise it in modes prescribed by law. But its exercise can be and should be restrained whenever its legitimate limits have been exceeded, or when the Legislature has either abused or perverted the power. Of course this right to appropriate private property for public uses must lie dormant in the State, until the Legislature by law points out the modes, conditions and agencies whereby the appropriation can be made.

It is difficult to define all the cases, which the courts would hold to be "public uses" within the meaning of this section of our Constitution, but we may form a better idea of what is meant by the phrase, "public uses," by ascertaining what the courts and especially what the courts of Virginia prior to our separation, and the courts of this State have since had occasion to hold to be a *public use* of property.

Anciently the most usual occasion on which the State ex-

exercised this right of eminent domain was by its authorizing persons owning mill sites and desiring to build a water grist-mill where it was necessary to abut his dam on the land of another, or when the lands of others would be overflowed, to condemn land for such purposes and uses. This mode of proceeding for acquiring lands for the building of such water grist-mills was regulated by statutes, which were passed at a very early period, even prior to the year 1700. And the statutes embraced all the details, by which such lands were to be condemned. Many of these acts are referred to in the notes to ch. 235 of the Revised Code of Virginia of 1819, vol. 2. p. 225 to 232, and this chapter will show the general character of these acts. While these acts provided, that lands of others could be condemned for the erection of water grist-mills they also imposed on the owners of such water grist-mills many obligations to the general public. As examples of some of these duties so imposed on the owners of such water grist-mills, I may refer to section 6 of chapter 325 of R. Code of 1819, vol. 2 p. 227. He was thereby required to begin the building of his mill and dam within one year, and to finish it within three years so as, that it should be in good condition for public use. And if it should be destroyed, he was in like manner to commence building it within one year, and was required to finish it within three years, and if he failed in either case, the title to the land condemned reverted to its former owner; and his leave to erect the dam and mill became void. By section 10 of this act no person was allowed to take toll for the grinding of grain, unless his mill was established by order of the court under that act p. 228; and by section 11 p. 228, for grinding grain into meal such mill owners were allowed one eighth part of the grain and no more, and for grinding it into hominy or malt one sixteenth part and no more, and they were compelled at these rates to grind all grain intended for the consumption of those bringing it and their families, and to grind the same in due turn as the same should be brought. These duties were enforced under penalties. See section 12. Section 13 required them to keep on hand at their mills sealed measures, and unless he had fifty acres of land he was not allowed to keep any grain at his mill. See section 14

p. 229. Other duties were also imposed on such mill owners not necessary to be mentioned. They were also prohibited from sitting on grand juries. See R. Code 1819 vol. 1 ch. 75 § 2 p. 264. Most of these onerous duties were but the re-enactment of old statutes, which had imposed these duties on the owners of water grist-mills almost from the first settlement of the States.

The court of appeals of Virginia, while acts of this character were enforced, constantly recognized the constitutionality of such acts, and often as a matter of course where the acts were complied with, recognized the right of the owners of such mill-sites to condemn lands for the erection of such dams for such water grist-mills, and also to condemn lands to be overflowed by the erection of such mill-dams. The following are some of the many cases wherein there was this silent recognition of the right to condemn lands for such purposes: *Bernard v. Brewer*, 2 Wash. 77 (top page 94); *Wroe v. Harris*, 2 Wash. 126 (top page 162); *Noel v. Sale*, 1 Call 495 (top page 431); *Wilkinson v. Mayo*, 3 H. & Munf. 565; *Coleman v. Moody*, 4 H. & Munf. 1; *Dawson v. Moons*, 4 Munf. 535; *Smith v. Wuddill*, 11 Leigh 532; *Hunter v. Mathews*, 1 Rob. 468; *Mirs v. Gallahue*, 9 Gratt. 94.

Originally the statute laws of Virginia authorized the condemnation of lands for water grist-mills alone, but it was afterwards extended so as to include not only water grist-mills, but other machines or engines useful to the public. But the Virginia reports show, so far as I have found, no case where there has been an attempt to condemn lands for the erection of any such machine or engine, and after these statutes were extended so as to include them, the cases all show, that the condemnation of lands were made in mill cases, and with an exception of one or two cases they show, that the mills were water grist-mills, so that I think we may assume that there were no condemnations in Virginia for any sort of mills, machines or engines, other than for water grist-mills. Though no reasons are assigned in these Virginia cases, why the courts should allow lands to be condemned for making dams for water grist-mills and for lands overflowed by such dams, yet it seems to me, that the acts of the Assembly with reference to the owners of water

grist-mills disclose clearly the true ground, on which these decisions really rest; and that is, that these owners of water grist-mills were by these acts made as it were public servants. Their mills did not belong to them to the exclusion of the general public in the sense, in which any other sort of private property belonged to them. For the use of any other property, such as a saw-mill for example, the general public have no special interest of a definite character. They could charge for sawing what they pleased, or they could refuse so saw at all for any particular person, or they could let their saw-mill go down or be destroyed, and they were not compelled to rebuild. But not so with their grist-mill. In these the general public had a direct, definite and immediate interest. They could compel the owner to grind their grain at prices fixed by law, and he could not refuse to grind for any individual, but was compelled to grind for all alike in the order, in which their grain was brought to the mill. He had no choice, but as the public servant he was bound to grind in the order and for the prices fixed by law.

This was very much the same as if the general public owned the mill, and he only ground for them at a toll. Then too, if the mill was destroyed he had to build it again for the accommodation of the general public, and if he failed to do so he lost all benefit resulting from the condemnation of the land, which had been made by him, or more properly speaking, which had been made by the general public or by the State in his name. Of course these reasons would have no application to any other species of mill owner other than the owner of a water grist-mill; such other mill owner is in no sense a public servant, and the general public has no direct interest in his mill. If it be a saw-mill for example, the owner of it was not bound to saw for any one except those for whom he chose to saw, and he charges them any prices he chooses, and discontinued the use of his saw-mill whenever he pleased.

The general public had then no direct tangible interest in a saw-mill, and it would be an abuse of terms to say, that the condemnation of land for the dam of a saw-mill or for land overflowed by it was a condemnation of land for a *public use*. It would be just as much an abuse of language as to

say, that the condemnation of land for a store-room or a lawyer's office was for a *public use*. In any such case of course the erection of a store or of a lawyer's office or a saw-mill might be a public convenience; but the public has no *use* of such store, office or saw-mill, has indeed no more interest in them than it has in a man's private dwelling house. Though doubtless public convenience and advantage, in a general sense, is promoted by the building of any private dwelling house in the community.

Having pointed out what I conceive to be the ground, on which the courts of Virginia have acted from time immemorial in allowing lands to be condemned for the building of dams for water grist-mills, and to condemn lands to be overflowed by the erection of such dams, having shown why there does not appear in the Virginia reports any case of the condemnation of lands for the dams of saw-mills, or of any other sort of manufactory, or for lands overflowed by any other sort of dams, I propose now to examine more in detail the foundations, on which rests this right of eminent domain, this power on the part of the State to condemn private property for *public use*.

In the first place all the authorities concur in holding, that private property can never be taken without the consent of the owner for a private use only, either with or without compensation. It is true there is neither in our Constitution nor in the Constitution of the other States any express provision forbidding, that private property should be taken for the private use of another, or any constitutional provision forbidding the Legislature to pass laws, whereby the private property of one citizen may be taken and transferred to another for his private use, without the consent of the owner. It was doubtless regarded as unnecessary to insert such a provision in the Constitution or bill of rights, as the exercise of such an arbitrary power of transferring by legislation the property of one person to another, without his consent, was contrary to the fundamental principles of every republican government; and in a republican government neither the legislative, executive nor judicial department can possess unlimited power. Such a power as that of taking the private property of one and transferring to another for his own

use, is not in its nature legislative, and it is only legislative power, which by the Constitution is conferred on the Legislature. Such an act if passed by the Legislature would not in its nature be a law, but would really be an act of robbery; the exercise of an arbitrary power not conferred on the Legislature.

Other reasons have been given why such a power could not be exercised by the Legislature. In fact this ninth section of our bill of rights while it does not expressly forbid it, strongly negatives the existence of such power by implication. It assumes the right of the Legislature to take private property for *public* use, and regulates and restrains this right of the State. Surely this implies, that the far greater power to take private property for private purposes was not contemplated by the framers of our Constitution to exist in the Legislature, for if this had been contemplated is it not obvious, that some restraints on its exercise would have been inserted in the bill of rights, which was so careful of the rights of citizens as to provide, that their private property should not be taken even for public use without just compensation? and when not taken directly by the public, though taken for a public use yet, it was to be taken and the compensation to be paid was to be estimated only in the manner prescribed in the Constitution.

There is an entire concurrence of all the authorities in the proposition, that private property cannot be taken for private use, either with or without compensation. A few of the many authorities, in which this proposition is laid down as unquestionable law are here cited. See: In the matter of *Albany Street*, 11 Wend. 151; *Embury v. Conner*, 5 Comst. 511; *Taylor v. Porter*, 4 Hill (N. Y.) 140; *Beekman v. R. R. Co.*, 3 Paige 73; *Concord R. R. Co. v. Greely*, 17 N. H. 47; *Dunn v. Charleston*, Harper (S. C.) Law R. 189; *Bankhead v. Brown*, 25 Iowa 540; *Wilkison v. Leland*, 2 Pet. 627; *Robinson v. Swope, &c.*, 12 Bush. 21; *N. & L. R. Cor. v. S. L. R. Co.*, 2 Gray 137; *Ten Eyck v. D. & R. C. Co.*, 3 Harr. 200; *Variak v. Smith*, 5 Paige 137; *Parham v. Justices, &c.*, 9 Ga. 341; *Hall v. Boyd*, 14 Ga. 1; *Clark v. White*, 2 Swann 540; *Bangor R. R. v. McComb*, 60 Me. 290; *Heburn's Case*, 3 Bland 95; *West River Bridge v. Dix*, 6 How. 507; *Sadler v.*

Langham, 34 Ala. 311; *Pittsburg v. Scott*, 1 Pa. St. 309; matter of *John and Cherry Street*, 19 Wend. 689; *Cooper v. Williams*, 4 Ohio 253; *Buckingham v. Smith*, 10 Ohio 296; *Reeves v. The Treasurer of Wood County*, 8 Ohio N. S. 333; *Bloodgood v. Mohawk & Hudson R. R. Co.*, 18 Wend. 55; *Kramer v. Cleveland & Pittsburg R. R. Co.*, 5 Ohio N. S. 146; *Pratt v. Brown*, 3 Wis. 603; *N. Y. & Harlem R. R. Co. v. Kip*, 46 N. Y. 546; *Nesbit v. Trumbo*, 39 Ill. 110; *Osborn v. Hunt*, 24 Wis. 90; and *Tyler v. Beacher*, 44 Vt. 648.

Upon the question in what manner and by whom it is to be determined, whether the proposed use for which the property is to be taken is "a public use" there has been apparently some diversity of views; but I think there is but little difficulty in determining the question; the difference of opinion, which seemingly exists being really more apparent than real. This difference is really more the result of the different language used than a substantial difference of opinion. The decisions as well as reason lead to this conclusion. The Legislature by its general act declares in the first place what is a "public use," for which private property may be condemned; but in the very nature of the case this determination of the Legislature in the first instance can not be conclusive on the courts. If it were, the provision of our bill of rights, that private property shall not be taken for public uses, except on the payment of just compensation, implying as it does, that private property shall not be taken except for public use, would be of little practical value. It was intended as a protection to the citizen against the abuse of power by the different departments of the government.

This constitutional provision was more expressly intended to control the legislative department of the government. How can this control be exerted or made available, if the Legislature is the sole judge of the extent of its power in authorizing this exercise of the right of eminent domain? Would not the so holding render the Legislature omnipotent in this respect, when the Constitution shows it was deemed a dangerous power, which needed to be restrained to prevent injustice to the individual citizen? Both reason and authority leads us to the conclusion, that the existence or non-existence of a public use in any given class of cases, in which

the Legislature has authorized private property to be condemned must be determined by the courts. See *Sadler v. Langham*, 34 Ala. 326-329; *Tyler v. Beacher*, 44 Vt. 648; *New Central Coal Co. v. Coal and Iron Co.*, 37 Md. 537; *Parkham v. Justices*, 9 Ga. 341; *Channel Coal Co. v. Railroad*, 51 Cal. 269.

But if in a particular class of cases it be doubtful, whether the use, for which the Legislature has authorized land to be condemned, is a public use or is only private use, the leaning of the courts will be rather in favor of its being a public use, as otherwise they must hold such act unconstitutional and void, and this they will not do, as we have seen, unless the court is of opinion, that the act is clearly unconstitutional. But though where the Legislature in a particular class of cases has authorized lands to be condemned, the courts will incline to holding the use, for which such condemnation is to be had is a public use, yet, if it clearly is not, the courts will determine and pronounce the act unconstitutional nor will the courts permit a formal act authorizing condemnations to be abused, by permitting its use in condemning lands for private and not for public use. See *West Pennsylvania Inst. v. Edgwood R. R.* 79 Pa. 257; *Stockton R. R. Co. v. Stockton*, 41 Cal. 147; *Bankhead v. Brown*, 25 Iowa 540; *Pittsburgh v. Scott*, 1 Pa. St. 309.

If the use is clearly a public use, then the courts can neither restrain nor supervise the legislative authority over the subject. If the use be public it is for the Legislature to determine, whether the necessity for the exercise of this right of eminent domain exists, and the extent to which its exercise shall be carried. See *North Missouri R. R. Co. v. Gott*, 25 Mo. 540; *Concord R. R. v. Greeley*, 17 N. H. 47; *Hingham Bridge v. Norfolk*, 6 Allen 353; *Water Works Co. v. Burkhart*, 41 Ind. 364; *Challiss v. Atcheson R. R.*, 10 Kan. 117; *County Court of St. Louis County v. Griswold*, 58 Mo. 175; *Brooklin Park v. Armstrong*, 45 N. Y. 234; *Secombe v. Minn. R. R.*, 23 Wal. 108; *Weir v. St. Paul R. R.*, 18 Minn. 155; *Dickey v. Tennison*, 27 Mo. 378; *Tyler v. Beacher*, 44 Vt. 648; *Haverhill Bridge v. County Commissioners*, 103 Mass. 120; *John and Cherry Street* 19 Wend. 659; *Bloodgood v. Mohawk R. R.* 18 Wend. 9; *Harris v. Thompson*, 9 Barb.

350; *Beekman v. Saratoga R. R.* 8 Paige 45; *Carter v. Tidewater Co.* 18 N. J. Eq. 54; *Whiteman's Ex'rs v. Wilmington R. R.* 2 How. 514; *Northern Central Coal Co. v. Coal & Iron Co.* 37 Md. 537; *Bankhead v. Brown*, 25 Iowa 540.

When once the court has determined, that the use for which property is condemned is a public use, its judicial function is gone, and the legislative discretion is unrestrained. Whether the proposed plan will accomplish the end proposed, or to what extent it will be beneficial to the public, are not matters to be determined by the courts; these are matters belonging to the legislative discretion, and the courts are called upon to sustain and do sustain statutes, which may be palpably improvident and hasty. See *Deitrich v. Murdock*, 42 Mo. 279; *West Pennsylvania Inst. v. Edgewood R. R.*, 79 Pa. 257; *Smedley v. Erwin*, 51 Pa. 445; *Giesey v. Cincinnati R. R.*, 4 Ohio St. 308.

As then the only real enquiry in this or in any other case where the constitutionality of an act of the Legislature, which authorizes the condemnation of land is simply, whether the use for which the private property is authorized to be condemned is a *public* use or only a *private* use, we will now enquire into the elements, which the courts have held enter into and constitute a *public* use as distinguished from a *private* use of property. This it will be found depends largely upon whether the property condemned is under the direct control and use of the government or public officers of the government, or what is almost the same thing in the direct use and occupation of the public at large, though under the control of private persons or of a corporation; these together constituting one class. Or whether it is in the direct use and occupation of private persons or of a corporation, and the general public has only an indirect and qualified use of the property condemned, or perhaps no use properly of any kind of the property condemned, but simply derives from its use by and for a private person or corporation some indirect advantage, as by the promotion of the general prosperity of the community; these together constituting a second class. To the first of these classes belong cases where the land is authorized to be condemned for public buildings or a public park, and where it is authorized to be condemned for a canal company or a turnpike company,

Where the land is condemned for public buildings or a public park or the like, and public officers have complete control of the property, the act of the Legislature authorizing the condemnation is clearly constitutional, for the use for which the property is condemned is obviously a public use. It is true, that in the case of the *West River Bridge v. Dix*, 6 How. Judge Woodbury seemed to doubt, whether property, which was not absolutely necessary, but only convenient for public use could be condemned, and indicated if property could be purchased it should not be condemned for such purposes as hospitals, court houses and jails; but the practice of the States and the federal government since that time in condemning lands for such purposes has been so frequent and so often approved by the courts, that the legislative control over the necessity as well as the particular location of such buildings may be now regarded as universally conceded.

To the same general class belong cases where the general public have the immediate use of the property condemned without charge, as in cases of public highways where the property condemned is under the control of public officers, though the gratuitous use of the property is enjoyed by the public at large, or what differs from it in some important respects, but still belongs to the same general class, where the property condemned is in the hands and direct control of individuals or of a corporation, who hold the title to the property and enjoy it to a large extent as their private property, but who hold it nevertheless in a species of trust for the use of the general public, who are entitled on terms fixed by the law, and not by such private person or corporation to the free use of the property so condemned. Of this character are canals, bridges and turnpikes. No one has ever questioned the right of the Legislature by law to authorize the condemnation of private property for such uses. The uses for which property is condemned when condemned for a canal, a bridge or a turnpike is as obviously a public use as if it were condemned for a court house or other public building, or for a public highway. The fact, that the title to the property condemned belongs to a corporation as private property, in no manner prevents the use of it being directly

for a public use, when the entire public has an equal right to use the property upon the payment of certain tolls fixed not by the corporation, the owner of the canal or of the turnpike, but by the general public through the Legislature.

That in all such cases the Legislature has a right to authorize the condemnation of land, none dispute. See *Chesapeake Canal Co. v. Key*, 3 Cranch C. Ct. R. 599; *Mount Washington Road*, 35 N. H. 134; *Arnold v. Corington Bridge*, 1 Duv. 372; *Palmer v. The State*, Wright (Ohio) 364. The only difficulty in such cases is to determine, whether a road which has been established under a particular act of the Legislature is really a *public* highway or only a private road.

All agree, that if the road has been established by public authority, and the damages for the condemnation of the land has been paid by the general public, and the road is under the control and management of public officers, whose duty it is to keep it in repair, then it is a public highway, and the Legislature may constitutionally authorize the condemnation of land for the route of such a road, though it may have been opened under such act by a county court on the application of a single person to whose house the road led from some public road; and though it may not have been expected when the road was established, that it would be used to any considerable extent by any person, except the party for whose special accommodation it was opened. This was the character of the case of *Lewis v. Washington*, 5 Gratt. 265. The court say: "The authority of the county court to establish *public* roads, is a branch of their police jurisdiction, conferred for the benefit of all the citizens of the county, and to be exercised at the common expense out of the resources derived from the county levy.

"The use, convenience and advantage of the public, contemplated by the law, are benefits arising out of the aggregate of such improvements, to which the particular road so established contributes in a greater or less degree. But no limitation upon the power of the court, in regard to any proposed road, is to be found in the degree of accommodation, which it may extend to the public at large. That is a matter which addresses itself not to the authority, but the discretion of the court. It can not be predicated of any particu-

lar road, that it will be of direct utility to all the citizens of the county. It may accommodate in travel and transportation but a small neighborhood, or only a few individuals. Still when established it may be used at pleasure by all the citizens of the county or country; and the public is interested in the accommodation of all the members of the community."

With these views I entirely concur. The Legislature can authorize a county court to open a public highway at the expense of the county, and place it under the control of public officers whose duty it is to keep it in order, and the fact, that the Legislature authorized this to be done on the application of a single person and it was done for his special accommodation, though it might be apparent, that such road would be used to but a very small extent by any other person than such applicant, still such act would be constitutional, and such an opening of a public road by the county court would be in the eyes of the law an opening of the road for public use, and a condemnation of land for such a road would be a legitimate exercise of the power of eminent domain by the State. That which distinguishes such a road from a private road or private way, we will consider more at large after we have gotten clearer ideas of what constitutes a public use.

The second class of cases to which I have alluded is where the property is in the direct use and occupation of a private person or of a private corporation, and the general public have only an indirect and qualified use of the property condemned, or perhaps no use probably of any kind of the property condemned, but simply derives from its use by the owner for his private purposes some indirect advantage, as by the promotion of the general prosperity of the community. To this class belongs railroads, ferries, and grist-mills, as well as some other species of property and employments, to which we will presently refer. It is obvious, that this entire class differ greatly from the first class, of which we have spoken, and that unless carefully guarded there is great danger, that the Legislature urged on by a popular sentiment or claim would authorize private persons or private corporations, claiming to come under this second class, to condemn lands nominally for the public use, but really for their own private

use in violation of the rights of private property, as designed to be protected by the Constitution. The courts have therefore in such cases thrown around the owners of private property safeguards, which we should be careful not to permit to be broken down.

I think we can show from the decisions, that a person or corporation claiming to belong to this second class, and to have legislative authority to condemn lands, must first show, that he or they are possessed of each and all of these three qualifications. First, the general public must have a definite and fixed use of the property to be condemned, a use independent of the will of the private person or private corporation in whom the title of the property when condemned will be vested; a public use which cannot be defeated by such private owner, but which public use continues to be guarded and controlled by the general public through laws passed by the Legislature; second, this *public use* must be clearly a needful one for the public, one which cannot be given up without obvious general loss and inconvenience; third, it must be impossible, or very difficult at least, to secure the same public uses and purposes in any other way than by authorizing the condemnation of private property.

If any one of these essentials are wanting, the courts will declare the act of the Legislature authorizing such condemnation of private property to be unconstitutional, because it would amount to taking private property for *private* and not for public uses. It is obvious, that both railroad companies and owners of ferries have all these three qualifications; and accordingly no one disputes the right of the Legislature to authorize either railroad companies or owners of ferries to condemn lands for their appropriate uses.

First, the general public has a definite and fixed use of both a railroad and a ferry, a use entirely independent of the will of the railroad company or ferry owner; a public use, which cannot be defeated by the railroad company or by the owner of the ferry, but which continues always to be guarded and controlled by law. The general public have a right to use the railroad or ferry for the transportation of persons or property, at fixed rates prescribed by the law, and neither the railroad company nor the owner of the ferry has

a right to decline to permit any one of the general public to so use the railroad or ferry for transportation; nor can they charge beyond what the law permits them to charge for such use of their property. They then do not own this property as their private property in the sense in which all others own private property; but this property in their hands has placed upon it a trust for the general public use, which trust they cannot violate or disregard. Second, it is obvious, that this public use of both railroads and ferries is clearly a needful one for the general public, and one which could not be surrendered by the public without obvious loss and general inconvenience. And lastly it is obviously impossible for either railroads or ferries to be established and run for the public use, unless the railroad company or the owner of the ferry is allowed to condemn lands for these purposes.

One man by his obstinacy or excessive avarice might readily prevent the building of a railroad. For in many instances it would be physically impossible to run around or avoid passing through his farm, and but for the power of condemning his land he could prevent the public from having the use of a railroad, which might be almost indispensable to the progress and development of the country.

So too by refusing to permit a landing, one obstinate man could prevent the establishment of a ferry necessary for the public use, as the ferry could often be only established by there being a landing on his property. As these three requisites unite in the case of railroads and ferries, all agree, that lands may be condemned for their use. See *Buffalo R. R. v. Brainard*, 9 N. Y. 100; *Beekman v. Saratoga R. R.*, 3 Paige 45; *Raleigh R. R. v. Davis*, 2 Dev. & B. 451; *Swan v. Williams*, 2 Mich. 427; *Pine Grove v. Talcot*, 19 Wal. 666; *Secombe v. Milwaukee R. R.*, 23 Wal. 108; *Weir v. St. Paul R. R.*, 18 Minn. 155; *Concord R. R. v. Greely*, 17 N. H. 47; *Brown v. Beaty*, 34 Miss. 227; *Swann v. Williams*, 2 Mich. 427; *Stewart v. Polk County*, 30 Iowa 9; *Day v. Stetson*, 8 Me. 365. Upon the principles we have laid down it would follow, that the Legislature could not authorize lands to be condemned for the erection of dams, or for the overflowing of lands by dams erected for saw-mills or manufactories generally, because they obviously want the first qualification we

have laid down as necessary to confer this power on the Legislature. The general public have no definite and fixed use of any such mills and manufactories; they have no use of them, which is independent of the will of the owners of such mills and manufactories, and they can be defeated in any sort of use of such mills and manufactories at the pleasure of the owners of them. For the Legislatures have never required saw-mills or manufactories generally to do work for any one, except those for whom they chose to work, nor have they fixed their prices for work, nor do they require them to continue their business as manufacturers any longer than they choose to do so.

It would seem therefore to follow, that the public had no such use in such mills or factories as would justify the Legislature in authorizing them to condemn lands, and this has been the decisions of the courts in Maine, New York and Michigan. See *Jordan v. Woodward*, 40 Me. 317; *Hay v. Cohees*, 3 Barb. 42; *Ryerson v. Brown*, 35 Mich. 333. The same doctrines are held in Vermont where they hold, that the Legislature can not even authorize the condemnation of lands for a grist-mill. See *Tyler v. Beacher*, 44 Vt. 648. And that there could be no condemnation of lands for any sort of mill except for a water grist-mill is fairly inferable from *Sadler v. Langham* and *Moore & Wright v. Rice*, 34 Ala. 325. In *Loughbridge v. Harris*, 42 Ga. 505, the court holds, that there can be no condemnations of lands for any sort of factories or mills including water grist-mills.

But on the contrary statutes have been sustained as constitutional, which authorized the condemnation of lands for water powers to establish mills and factories in Massachusetts, New Jersey, Connecticut, Tennessee, Minnesota and Kansas. See *Boston Mill Dam v. Newman*, 12 Pick. 467; *Scudder v. Trenton Falls Co.*, 1 N. J. Eq. 694; *Olmstead v. Camp*, 33 Conn. 532; *Harding v. Goodlett*, 3 Yerg. 41; *Miller v. Troost*, 14 Minn. 365; *Harding v. Funk*, 8 Kans. 315. And the Supreme Court of the United States in *Holyoke Co. v. Lyman*, 15 Wal. 500, recognize this doctrine to a certain extent.

These decisions are based on the idea, that public use does not mean, that the public should have either the immediate

use of the property condemned, or the control by law of those for whose use the property is condemned, but that public use means simply public utility or usefulness in its most general sense; that is public convenience or benefit resulting in any incidental manner. But this ground of these decisions puts the exercise of the right of eminent domain on such a loose and unsatisfactory basis, that it has been disapproved of in some of the very States in which it had been long acted upon. And while they still hold such acts of the Legislature constitutional, the courts admit, that they have gone to the very verge of constitutional power, and say, that but for the long continued decisions of their courts they would hold such acts to be unconstitutional, while others given them for reasons of this character a reluctant support. See *Ocum Co. v. Sprague Co.*, 35 Conn. 496; *Powers v. Bears*, 12 Wis. 213; *Miller v. Troost*, 14 Minn. 365. In some States, as in Michigan, they have reversed their previous decisions. See *Ryerson v. Brown*, 35 Mich. 333.

The truth seems to be, that in the early history of this country when water power was the exclusive means whereby mills could be driven, the Legislature encouraged the development of this water power as a matter of great public utility, and from an urgent necessity then supposed to exist, delegated this power of eminent domain to persons desiring to erect mills, and in so doing frequently exceeded their constitutional powers. But these acts were sustained by the courts at first without much consideration of the subject, no contest over the matter having been raised for many years; and when the question was afterwards raised, the constitutionality of these mill acts was sustained partly because of long acquiescence, and partly because of a supposed urgent public convenience and necessity. But in modern times, when these questions have been considered under more favorable circumstances, the decisions have been generally against the constitutionality of these mill acts.

Perhaps on principle the water grist-mills of this State and of Virginia ought to be made exceptions, as we have seen that the owners of such mills by the laws are required to grind for all alike and at fixed tolls, which brings them clearly within the same category as railroads and ferries,

the only difficulty intervening being, that at this time it can not perhaps be said, that unless the owners of water grist-mills are allowed to condemn lands it is impossible or even very difficult for the people of this State to have their grain ground. This was no doubt formerly perfectly true, and the courts then could not have done otherwise than hold, as they did, that the owners of water grist-mills might condemn lands. And this has been so long the established custom of the State, that no doubt it would not and ought not to be now departed from, unless the Legislature thinks proper to change the statute laws on the subject. Owners of hotels would have the same grounds for claiming, that if authorized by the Legislature they could condemn lands. But such legislation would not be constitutional, as it is obvious, that it is neither impossible nor very difficult to have hotels built, as they always have been, without the exercise of the power of eminent domain in their behalf.

It would seem therefore from these principles to be clear, that the Legislature cannot authorize the condemnation of lands in any case, no matter how urgent, for the establishment of a private road. In *Taylor v. Porter*, 4 Hill 140; *Rice v. Alley*, 1 Snead 51; *Clack v. White*, 2 Swann 540 and *Osborne v. Hart*, 24 Wis. 90, it was decided that statutory laws very similar to those contained in chapter 194 of the Acts of 1872-73, so far as the provisions in said chapter relates to private roads, were unconstitutional, because they authorized lands to be taken and condemned for the purpose of making private roads for the use of an individual, and that too though he paid all the costs of opening the roads and maintaining the same. But it should be observed, that there were in the statute laws of New York, Tennessee and Wisconsin where these decisions were rendered a provision not to be found in said act of chapter 194 of Acts of 1872-73. This provision was: "Every such private road when so laid out shall be for the use of the applicant, his heirs and assigns, but not to be converted into any other use or purpose than that of a road. Nor shall the occupant or owner of the land be permitted to use the same, unless he shall have signified his intention of so making use of the same to the jury or commissioners, who ascertained

the damages sustained by laying out such road before such damages were so ascertained." This provision evidently had some influence with the courts in reaching the conclusion they did. I do not however think, that this provision had a controlling influence on these courts. And from this reasoning I infer, that they would have reached the same conclusion though this provision had not been in their statute law. But the same conclusion was reached in *Wild v. Deig*, 43 Ind. 455; *Stewart v. Hartman*, 46 Ind. 331; *Burkhead v. Brown*, 25 Iowa 540; *Sadler v. Langham*, 34 Ala. 311; *Nesbitt v. Trumbo*, 39 Ill. 110; *Crear v. Crossley*, 40 Ill. 175; *Dicky v. Tnison*, 27 Mo. 373.

There were no provisions in the statute law of any of these States resembling that in the New York statute, but these laws were very similar to those provisions of our law contained in chapter 194 of the Acts of 1872-73 in reference to private roads. The ground of their decisions are thus expressed by Chief Justice Dillon in *Buckhard v. Brown*, 25 Iowa 545. After quoting the constitutional provision, that "private property shall not be taken for public use without just compensation," he proceeds then: "The following propositions applicable to this case may be regarded as plain in themselves, and as having the sanction of authority:

"1. The constitutional limitations above quoted prohibits by implication the taking of private property, for any private use whatever, without the consent of the owner. In the matter of *Albany Street*, 11 Wend. 151; *Embury v. Conner*, 3 Const. 511; *Taylor v. Porter*, 4 Hill (N. Y.) 140; *Beekman v. R. R. Co.*, 3 Paige 73; Mr. Sedgwick's opinion in Constitutional Law p. 514; *Concord R. R. Co. v. Greely*, 17 N. H. 47; *Dunn v. Charleston*, Harper (S. C.) Con. R. 189.

"2. It forbids private property from being compulsorily taken for any but *public use*, and then only upon just compensation being made, the amount of which is to be assessed by a jury. Bill of Rights § 18 and authorities just cited.

"3. When the public exigencies demand the exercise of the power of taking private property for the public use, is solely a question for the Legislature, upon whose determination the courts cannot sit in judgment. *Spring v. Rupell*, 7 Greenl. 292; *Concord R. R. Co. v. Greely*, 17 N. H. 47; *Varick v.*

Smith, 5 Paige 160; *Hartwell v. Armstrong*, 19 Barb. 166; *Bloodgood v. Railroad Co.*, 18 Wend. 14; *Beckman v. Railroad Co.*, 3 Paige 72; Sedgw. on Const. Law pp. 511-514.

"4. That what is such a public use as will justify the exercise of the power of eminent domain, is a question for the courts. 2 Kent Com. 340; *Concord Railroad Co. v. Greely*, 17 N. H. 47; *Hausen v. Vernon*, 26 Iowa. But if a public use be declared by the Legislature the courts will hold the use public, unless it manifestly appears by the provisions of the act, that they can have no tendency to advance and promote such public use. Per Shaw C. J. in *Hazen v. Essex County*, 12 Cush. 477. That private property may be constitutionally taken for public highways can not be doubted and is not denied. * * * The State may properly provide for the establishment of a public road or highway to enable every citizen to discharge his duties. The State is not bound to allow its citizens to be walled in, insulated, imprisoned; but may provide them a way of deliverance. The State may provide a public highway to a man's house, or a public highway to coal or other mines.

"If the road now in question had been established as a public road under the general road law, as we confess we do not see why it might not have been, there would be in our minds no doubt of its validity, although it does not exceed a half a mile in length, and traverses the lands of but a single owner. For the right to take land for a public road, that is a road demanded by public convenience, as an outlet to a neighborhood, or it may be as I think for a single farmer, without other means of communication, cannot depend upon the length of the road, or the number of persons through whose property it may pass.

"With respect to the act of 1866, and we could say with respect to the provisions of our chapter 194 of Acts of 1872-73 in reference to private roads, which are essentially the same as this Iowa act of 1866, we are of opinion, that the roads thereunder established are *essentially private*, that is on the private property of the applicant therefor because:

"*First.* The statute denominates them *private roads*. If these roads are not *private* and different from ordinary and *public roads*, there was no necessity for these provisions.

Second. Such road may be established upon the petition of the applicant alone; and he must pay the costs and damages occasioned thereby, and perform such other conditions as to fences, &c., as the board may require.

Third. The public are not bound to work or keep such roads in repair, and this is a very satisfactory test as to whether a road is public or private.

Fourth. We see no reason when such a road is established, why the person at whose instance it was done, might not lock the gates opening into it or fence it up, or otherwise debar the public of any right thereto.

"Could not the plaintiffs in this case having procured the road in question abandon it at their pleasure? Could they not relinquish it to the defendants without consulting the board of supervisors? If this is so does it not incontestably establish the fact, that it is essentially *private*? For it must be private if it is of such a nature, that the plaintiffs can at their pleasure use or forbid its use, abandon or refuse to abandon it, relinquish or refuse to relinquish it? If the act of 1866 is valid might not the plaintiffs, having procured the road, use it for laying down a tram or horse railway, and forbid everybody from using the road, and even exclude all persons therefrom? Who could prevent it? These considerations make the great difference between such a road and a public highway, and demonstrate the essentially *private* character of the road."

The judge then proceeds to show, that these views are sustained by the weight of authority, and in reversing the cases well says that: "*Harvey v. Thomas*, (10 Watts 63) followed in the case of the *Pocopsen Road* (16 Pa. St. 15), are of doubtful soundness outside of Pennsylvania." He concludes, that "wherever by any well considered decision private roads have been sustained, it was because they were regarded as public in their character; and if so properly regarded laws authorizing their establishment would doubtless be valid

* * We have the less hesitation in declaring the act of 1861 unconstitutional, inasmuch as every useful purpose it was intended to accomplish may be attained under the general statutes of the State authorizing the establishment of public roads."

I have quoted this opinion of Judge Dillon at some length, because it expresses accurately my views of the provisions of chapter 194 of Acts of 1872-73, so far as they refer to private roads. They are indeed very similar to this act of Iowa of 1866. Judge Beck dissented from this opinion on the ground, that though this road was called in the act a private road yet it was when opened essentially a public road, which the public possessed the same right to use as a road established in any other manner authorized by law. In my judgment the views of Chief Justice Dillon are well sustained by the weight of authorities, many of which we have before cited.

The best considered cases in opposition to these views were decided in part on a diversity in the statute laws, but principally because of a fundamental difference in opinion as to what is properly meant by "public use," for which alone lands can be condemned. In some of the States these words are considered simply as "public advantage or general welfare." And in those States lands may be condemned to establish dams for the erection of mills of any character, though such mills when erected are purely private property, and are in no manner controlled by the public; and thus owners work for whom they please and at what prices they please, or if they choose decline to do any work of any sort. Such is the law in Massachusetts as interpreted by their courts, and with such views it is natural that they should hold that private roads may be established under a law authorizing private property to be condemned for their route. See *Sherman v. County Commissioner*, 112 Mass. 202. Like views are expressed in *Proctor v. Andover*, 42 N. H. 348; *Coster v. Tidewater Co.*, 18 N. J. Eq. 54; *Sherman v. Burch*, 32 Cal. 241; and in some other cases. But we need not review them, they all proceed on the basis, that such private road are essentially for the public use, and their idea of what constitutes public use is essentially different from ours.

The views which I have expressed are in accord with the views on this subject, which have been expressed by the Court of Appeals of both Virginia and West Virginia. Thus in *Lewis v. Washington*, 5 Gratt. 265, it was decided, that under the statute law of Virginia, which is the same as ours, there was no limitation to the power of a county court

to establish a *public* road was to be found in the degree of accommodation, which it may afford the *public* at large. That is a matter, which addresses itself not to the authority but to the discretion of the court; and that if the road so established led into a public road its other terminus might be a private farm or dwelling-house. No individual has the right to demand the opening of such a public road for his accommodation. The court say: "It redounds in some degree, to the interest of the public, that all the citizens who compose it should be so accommodated; and there is no principle, upon which the wants and necessities of one individual must be imperatively rejected, which would not be applicable to two or three or a dozen, or any given number short of the whole or the greater part of the community." And again: "It appears," says the court, "that the road is requisite to enable the applicant to travel to the court house of his county, and other public places contemplated by law."

The road in that case was a *public* road to all intents and purposes, and was established under the same law and in the same manner with all other public roads. That it is proper to open such a road to the residence of a citizen seems to me clear, as the public have a direct interest in enabling all the members of the community to perform their public duties, which they might not be able to perform if they could not reach the court house without trespassing on their neighbor, or if the sheriff or other officer could not go their houses without committing such trespass.

In the *Salt Company v. Brown*, 7 W. Va. 191 this Court decided as stated in the syllabus, "that an incorporated company being the owner of coal lands desires to obtain a subterranean passage through or under the lands of another person for the purpose of mining and removing its own coal, and applies to the court for the benefit of sections 44 and 45 of chapter 43 of the Code. The report of the commissioners and the evidence in the case show, that the company is the owner of some thirty acres of coal land, from which coal could not be mined and transported without going through the land of the defendants; that the company use said coal for the purpose of manufacturing salt at their furnaces, and to sell to the public living in and about Hartford city; that

the people living in and about said town could obtain coal also from other sources, and that the *public would not use the subterranean way, set out and described in the commissioner's report, through the land of the company, but the company only: Held*, That the report and evidence do not show, that the purpose for which the property is taken is such public utility as that the said report should be confirmed by the court under section 45 of said chapter 43 of the Code."

Judge Paull says in this case p. 199 referring to the examples given by Judge Cooley in his work on Con. Limit. 532: "In looking at the class of objects above enumerated we find, that they are all of an undoubted needful character; in other words there is connected with them all a clear *public use*; this element is indispensable; again we find in regard to them all, *the government still maintains its power, and can so regulate and control the action of the agencies, by which they are managed as to secure the rights and interest of the public therein*: and if to these we add the impossibility or extreme difficulty at least of effectuating the same purpose in any other way, we may perhaps find in the combination of these three elements a safe rule for our guidance in any particular case, whether there has been a constitutional exercise of the right of eminent domain." It will be observed, that these are just the views, which I have expressed and enlarged upon in this opinion.

It is obvious under this rule, that the acts of Massachusetts and other States known as mill-acts, whereby water-power is condemned for private mills, which are under no public control after they are built, would necessarily be declared unconstitutional. And it is principally due to what I conceive to be false views of what is meant by public use, that some of the States have held the condemnation of lands for private roads to be constitutional.

Chapter 194, section 44, of Acts 1872-73, which we are considering provides: "The court shall grant such private road if it be made to appear, that the same is necessary to enable the applicant to reach and enjoy his own property, and that the granting thereof will not entail irreparable injury upon the party through whose lands the same will run." Now on the principle which we have laid down it seems to

me obvious, that "the reaching and enjoying one's own property" cannot possibly be regarded as a public use. It does not necessarily amount to a public benefit when this word is used in its most general and loose sense. It is obvious that the purpose of this road as thus declared in the act is a mere private use in which the public has no rights of any sort. And for such a purpose the condemnation of land cannot be authorized by the Legislature, without a disregard of our Constitution. If the purpose had been to give access to one's residence, then it might be argued perhaps that as the person was a citizen owing public duties, which he could not perform unless he had a road from his residence, the public had an interest in his being given the means of performing these public duties; and that his use of such a road in the performance of such duties ought not to be regarded as a private use of the road, but as a use of it by such citizen as one of the public, and in the performance of a public duty. Even then however it would seem but right if not absolutely necessary to make such a road a public road, and that it should be under the control and management of a public officer, and should be kept in order by the public; and if it was closed like the closing of any other public highway it should subject the offender to punishment. It is difficult to conceive how any road can be regarded as a public highway, which is not subject to the supervision and control by the public.

But this road under this act is not subject to this supervision and control and was opened to give access not to the residence of the applicant, but simply to his lands, not that he might have the means of performing his public duties, but for the far different purpose of enabling him individually to enjoy his property; in other words to enhance the value of his private property. This is surely no public use.

Our conclusion therefore is, that the 44th section of chapter 194 of the Acts of 1872-73 is unconstitutional, null and void; and that therefore the judgment of the circuit court of Harrison county rendered on June 6, 1881, whereby the *supersedeas* granted to A. J. Varner from the order of the county court of Harrison, made August 19, 1880, was dismissed, and A. J. Varner ordered to pay to Lehi Martin his costs by him expended, must be reversed, set aside and

annulled, and the plaintiff in error, A. J. Varner, must recover of the defendant in error, Lehi Martin, his costs in this Court expended. And this Court proceeding to render such judgment as the circuit court of Harrison, should have rendered doth moreover, set aside and annul the orders of the county court of Harrison, whereby the private road named in the report of the viewers in this case was established on certain conditions, and doth adjudge, that the said Lehi Martin do pay to A. J. Varner his costs expended in the circuit court of Harrison; and proceeding to render such judgment as the county court of Harrison should have rendered it is ordered, that the petition and application of Lehi Martin for said private road be dismissed, and that he pay to A. J. Varner his costs expended in the county court of Harrison.

JUDGES JOHNSON AND SNYDER CONCURRED.

JUDGMENT REVERSED. PETITION DISMISSED.

WHEELING.

WATSON v. MICHAEL AND ICE.

Submitted August 10, 1882—Decided April 21, 1883.

(*WOODS, JUDGE, Absent.)

1. A married woman living with her husband can under our statute convey her separate real estate by joining with her husband and after a privy examination of her in precisely the same manner, as is required in order to relinquish her interest in real estate not her separate property; and she can convey her separate real estate in no other manner. (p. 571.)
2. Unless the certificate of the privy examination of the wife shows, that all the requirements of the statute have been substantially complied with, the deed is void as to her. (p. 572.)
3. The words "and the deed being read to her" are not substantially the same as the words "being fully explained to her." (p. 574.)
4. Unless the certificate of acknowledgment shows, that "the deed was fully explained to her," it is fatally defective. (p. 574.)

*Cause submitted before Judge W. took his seat on the bench.

5. The certificate of the privy examination must show, that *during* such examination the writing "was fully explained to her;" and if such certificate shows, that such explanation was *before* the privy examination, it is fatally defective. (p. 574.)
6. When the husband unites in the deed, though it may be void as to the wife for a fatal defect in the certificate, yet the grantee may elect to take the husband's interest in the land in full satisfaction of the contract, unless it can be shown that for some cause the deed is also void as to the husband. (p. 575.)

Appeal from and *supersedeas* to a judgment of the circuit court of the county of Marion, rendered on the 29th day of July, 1881, in a cause in said court then pending, wherein Phebe J. Watson was plaintiff and Rawley E. Ice and Calvin Michael were defendants, allowed upon the petition of said Watson.

Hon. A. B. Fleming, judge of the second judicial circuit, rendered the decree appealed from.

The facts of the case are stated in the opinion of the Court.

Fontaine Smith for appellant cited the following authorities: 1 W. Va. 1; 2 Coke Inst. 514; 1 Tuck. Com. 267; 1 Munf. 518; 3 W. Va. 165; 14 Gratt. 501; 10 W. Va. 198; 14 W. Va. 322.

W. W. Arnett for appellee cited the following authorities: Code, ch. 66 § 3; 4 Leigh 498; 12 Leigh 448; 14 Gratt. 501; 2 Wash. 156; 4 Leigh 224.

JOHNSON, PRESIDENT, announced the opinion of the Court:

In January, 1880, Phebe J. Watson obtained from the judge of the circuit court of Marion county an injunction against the defendant, Rawley E. Ice, restraining him from the prosecution of an action of unlawful detainer, and from the use and occupation of the land claimed by her. The bill alleges, that plaintiff is a married woman, the wife of John D. Watson; that she was the owner of a separate estate consisting of fifty-nine acres situated in the said county of Marion; that her brother, Rawley E. Ice, was desirous of owning said land, and had often importuned her to sell it to him, and that she refused; that afterwards defendant, Calvin

Michael, by false and fraudulent representations induced her to exchange said tract of land for two hundred dollars in money and another tract of three hundred acres situated in Texas; that the price fixed upon the Marion county land was one thousand dollars, and that on the Texas land was eight hundred; that she and her husband joining in the deed for the said consideration conveyed said land to said Michael on the 28th day of July, 1879, and that said deed is exhibited with the bill. The bill also alleges, that about the same time Calvin Michael and wife conveyed said three hundred acres of Texas land to the plaintiff; that on the — day of —, 1879, said Michael and wife, for the consideration of seven hundred dollars as shown by the deed, conveyed said fifty-nine acres of land to the defendant, R. E. Ice. These last two deeds are referred to as exhibits C. and D., but are not filed.

The plaintiff charges fraud and collusion on the part of Michael and Ice, her brother, to procure the conveyance of said land to Michael, and then by him to Ice. She says, that the representations both as to title and quality of the Texas land, made to her by Michael, on which she solely relied, were entirely false, and that she ascertained the falsity of such representations at great labor and expense; that when she so ascertained these facts, she refused to give possession of the land, and that Ice brought this suit of unlawful detainer. She insists in her bill, that said deed is utterly void as to her, because of the totally defective acknowledgment as to her; the plain requirements of the statute not having been complied with. John D. Watson is not made a party to the suit. Both defendants answered. Michael denies the fraud charged against him, and avers, that the deed was fully explained to plaintiff, and he is advised, that there is no defect in the acknowledgment thereof. Ice in his answer denies all the charges of fraud and confederation; claims to be an innocent purchaser of said land and insists that he has good title thereto. Many depositions were taken in the cause to prove and to rebut the proof of fraud charged in the bill.

On the 29th day of July 1881 the cause was heard, and the court decided, that the deed was sufficient, and on the

evidence dissolved the injunction and dismissed the bill. From this decree the plaintiff appealed.

The first question we will examine is: Was the deed acknowledged as the statute requires? The certificate as to the wife after certifying the acknowledgment of the husband is as follows: "I further certify, that at the same time and place came Phebe J. Watson, wife of John D. Watson, whose name is also signed to the foregoing deed and bearing date as aforesaid, and having the same *read* to her, and being examined by me privily and apart from her said husband, she the said Phebe J. Watson, acknowledged said writing to be her act and deed, and declared that she had willingly executed the same, and does not wish to retract it." The requirement of the statute is, that the certificate shall contain words to the following effect: "And being examined by me privily and apart from her husband, *and having the said writing fully explained to her*, she the said — acknowledged the said writing to be her act and declared, that she had willingly executed the same, and does not wish to retract it."

The first requirement is, that the wife shall be examined touching the execution of the deed privily and apart from her husband. While she is undergoing this private examination *four* things are by the statute absolutely required. First, *the deed must be fully explained to her*; second, after it has been thus fully explained to her she must then *acknowledge it*. After this she must make two declarations. First, that *she had willingly executed the same*, and second, that *she does not wish to retract it*. All these things must appear in the certificate, and the certificate cannot afterwards be amended so as to show, that the requirements of the statute have been complied with; neither can such compliance be proved by parol evidence. *McMullen v. Eagan, supra*.

It is insisted in argument here, that when a married woman conveys her separate estate, it is not necessary to the validity of the deed, that she should be examined "privily and apart from her husband." But this Court has decided, that a married woman living with her husband can under our statute convey her separate real estate by joining with her husband and after privy examination of her in precisely the same manner, as is required to relinquish her interest in real

estate not her separate property; and she can convey her separate real estate in no other manner. *McMullen v. Eagan, supra*; *Leftwich v. Neal*, 7 W. Va. 569. The deed then is void as to her, unless the statute has been substantially complied with. *Harvey and wife v. Pecks*, 1 Munf. 518; *Linn v. Patton*, 10 W. Va. 187; *Leftwich v. Neal*, 7 W. Va. 569; *McMullen v. Eagan, supra*. None of the adjudicated cases require a literal compliance with the statute; but it is insisted in them, that every requisite of the statute shall be substantially complied with. The compliance with all of the requirements save one will not justify the inference, that that one was complied with substantially. Each requirement has its purpose, which cannot be effected by compliance with any or all of the other requirements.

In *Grove v. Zumbro*, 14 Gratt. 501, where the certificate wholly omitted the words "and she does not wish to retract it," it was held fatally defective. For the same reason the certificate was held fatally defective and the deed inoperative as to the wife, in *Linn v. Patton, trustee*, 10 W. Va. 187. In *Leftwich v. Neal*, 7 W. Va. 569, the words omitted were "*that she had willingly executed the same*;" and it was held fatally defective, as the words required were omitted, and the certificate contained no words of equivalent import. The certificate was: "And Lois Leftwich, wife of James Leftwich, whose name is signed to said writing being examined by me separate and apart from her husband, and having said writing fully explained to her, declared the same to be her act, and did not wish to retract it."

In *Laughlin v. Fream*, 14 W. Va. 322, the certificate was held fatally defective, because it failed to show, that the wife *was examined privily and apart from her husband*, and further because it omitted the words "*and declared that she had willingly executed the same*." No other words were substituted in the place of those omitted.

In *McMullen v. Eagan, supra*, the certificate was held fatally defective because it failed to show, that the wife while being examined privily and apart from her husband "*acknowledged the deed*." But during the privy examination the deed or writing must also be *fully explained to her*, "so that she may understand the full effect of the instrument upon her

rights before it is rendered irrevocable by her acknowledgment in this solemn mode. Thus she ought to be instructed, whether the deed conveys her own estate, or only relinquishes her dower interest in that of her husband. If it conveys her own estate, she should be told for what term, or what interest, whether for years, for life, or in fee." 1 Tuck. Comm. 257. In *Tod v. Baylor*, 4 Leigh 499 it was held unnecessary, as the statute then was, that the certificate should show, that the "deed was explained to the wife," as the statute did not require it. In *Hairstone v. Randolphs*, 12 Leigh 445, the certificate was held fatally defective because it did not show, that "the deed was explained to the wife, nor that she was in any way apprised of its contents and purpose." Allen, J., in delivering the opinion of the court, p. 463, says: "There is good reason for requiring substantial compliance with all the requisites of the statute. The statute of fines, 18 Ed. I, provided: "That if a woman *covert* be examined by four of said justices, and if she doth not assent thereunto, the fine shall not be levied."

Coke in his commentary on this statute, 2 Inst. 514, says: "The examination must be solely and secretly, and the effect thereof is, whether she be content of her own free will without any menace or threat to levy a fine of these parcels and name them unto her, everything distinctly contained in the writ, so as she perfectly understand what she doth." This statute had received therefore a construction in practice, which required an explanation to the wife, and her knowledge of the nature of the act done.

In *Bartlett v. Fleming*, 3 W. Va. 163, the certificate failed to show, that three of the requisites of the statute were complied with; it did not show, that "*the deed was fully explained to her*," nor that she had willingly executed the same, nor that she does not wish to retract it. It was of course held fatally defective.

But it is insisted here, that the words "read to her" are equivalent to "fully explained to her." Suppose the wife was a German or a French woman, and did not understand English at all, or but very imperfectly, could it be said, that if the deed was "read" to her, that that was equivalent to its having been fully explained to her? Reading an essay upon

an abstruse subject to a man of ordinary intelligence and education, could not be the equivalent of fully explaining the subject to him. A man is supposed to understand business, and to be able to take care of his own interest; he is supposed to understand what is meant by the language used in deeds, but a married woman is not, and therefore the law requires before she is bound by the execution of a deed, that she shall be examined separate and apart from her husband, free from his influence, and then when thus separated, she must be fully informed as to the legal effect or consequences of her act; the deed must under these circumstances be fully explained to her, not merely "read" to her, because if only "read" to her, she may not understand, that by it she forever divests herself of all interest in the property therein described. She might think, that she was merely relinquishing her dower interest in her husband's estate, or parting with an interest for a term of years, or with a life-estate in her own property. The person, who takes the acknowledgment, must under the statute inform her of her rights, and precisely what is the legal effect of the deed, which she has executed. A mere reading of the deed to her does not necessarily do this, and is in no sense the equivalent of "fully explaining it to her."

The certificate is fatally defective, and the deed as to Phebe J. Watson is void. The certificate is fatally defective for another reason. It is not certified, that the deed was ever "read" to her while separate and apart from her husband. The certificate reads: "I further certify, that at the same time and place came Phebe J. Watson, wife of John D. Watson, whose name is also signed to the foregoing deed bearing date as aforesaid, and *having the same read to her*, and being examined by me privily and apart from her husband, &c." Now from this certificate it appears, that the deed was read to her in the presence of her husband before her privy examination. It must be "fully explained to her" *during* her privy examination. She must be absent from her husband, while every one of the requisites of the statutes is being complied with, else there is no such "privy" examination as is required by the statute. The deed may be good as to the husband, John D. Watson, but whether it is

or not it is improper for us to decide in the absence of said Watson. We have not looked into the evidence to see, whether it is fraudulent either as to him or as to his wife. It is unnecessary to do so as to the wife, because it is void as to her on the ground already stated; and we cannot examine the evidence as to him, because he is not before the court.

This cause will have to be remanded, and the defendant, Michael, may elect, whether he will rescind the deed as to the husband, in which case the two hundred dollars and interest thereon will have to be refunded to him, and it will be a charge on the land as against Mrs. Watson until paid, or he may elect to take the interest of John D. Watson, to-wit, his courtesy in his wife's land, if he shall ever be entitled thereto, in full satisfaction of the contract, giving up the Texas land and the two hundred dollars already paid, provided said John D. Watson does not show to the Court, that said deed is also void as to him on account of fraud or otherwise. If the said defendant elects to take the interest of said John D. Watson, which can in no event attach until the death of his wife, (*Radford v. Carwile*, 13 W. Va. 572), he must take it without abatement of any part of the purchase-money and in full satisfaction of the contract. *Clark v. Reins*, 12 Gratt. 98; *Cady v. Gale*, 5 W. Va. 505. When this cause is again in the circuit court of Marion county, the defendant, Ice, may have in this cause, the deed and contract from Michael to him rescinded, and the parties to said deed placed in *statu quo*, or he may pursue such other remedies, with reference to said deed as he may be advised to take.

The decree of the circuit court of Marion county is reversed with costs to the appellant against the appellee, Michael; and this Court proceeding to render such decree as the circuit court should have rendered, the injunction is made perpetual; and this cause is remanded with instructions that John D. Watson be made a party to this suit and for further proceedings to be had therein according to the principles of this opinion, and further according to equity.

JUDGES GREEN AND SNYDER CONCURRED.

DECREE REVERSED. CAUSE REMANDED.

WHEELING.

CAPPELLAR v. QUEEN INSURANCE COMPANY.

Submitted August 15, 1882—Decided April 28, 1883.

(*WOODS, JUDGE, Absent.)

1. Where a declaration in an action on a policy of insurance is filed in the form prescribed by chapter 66 of Acts of 1877, section 1, and the defendant under the fourth section of this act pleads, that he is not liable to the plaintiff as is in said declaration alleged, but the real defense is, that the action cannot be maintained because of the failure to perform or comply with, or the violation of any clause, condition or warranty in, upon or annexed to the policy, or continued in or upon any paper, which is made by reference a part of the policy; and by this fourth section the defendant is required to file a statement, in writing, specifying by reference thereto or otherwise, the particular clause, condition or warranty, in respect to which such failure or violation is claimed to have occurred, with such affidavit thereto as is required by this section, and he accordingly offers to file such plea and statement, the court must permit such plea and statement with accompanying affidavit to be filed, and cannot refuse to permit such statement or any part thereof to be filed, either because in the opinion of the court certain facts set out in said statement constitute no defense to the plaintiff's action, or because the statement is so vague as not to notify the plaintiff in effect of the nature of the defense intended to be set up against him. (p. 591.)
2. If any of the facts set out in such statement constitute no defense to the action, the court on the motion of the plaintiff on the trial of the case, should exclude from the jury all evidence offered by the defendant to prove such immaterial facts. (p. 594.)
3. If any of the facts set out in such statement are set out so vaguely, as not to notify the plaintiff in effect of the nature of the defense intended to be set up against him, the court at the trial of the case before the jury should on motion of the plaintiff exclude all the evidence of the defendant offered to prove facts so insufficiently stated in his written statement and filed with his plea. (594.)
4. If however the defendant under the third section of said act is required by the court or judge to file a more particular state-

*Case submitted before Judge W. took his seat on the bench.

ment, in any respect, of the nature of his defenses, or of the facts expected to be proven at the trial, which must have the affidavit prescribed by this section attached to it, and such statement and affidavit are filed, the court may adjudge this statement filed under its order insufficient, if it be too vague to notify the plaintiff in effect of the nature of the defense intended to be set up against him; but not because the facts stated constitute in the judgment of the court no defense. And if the statement be regarded by the court as insufficient because of such vagueness, the court may have its judgment, that it is thus insufficient, entered of record, and, as justice may require, grant further time for filing the same, or permit the statement filed to be amended, or it may at the trial exclude evidence offered by the defendant if in default as to any matter, which he has so failed to state or has thus insufficiently stated, whether it has been so entered of record, or whether no entry of record has been made as to the sufficiency or insufficiency of such statement; or it can exclude evidence of any fact though set out definitely in such statement, if such fact constitutes in the judgment of the court at the trial no defense. But it cannot refuse to permit such statement to be filed when it is offered by the defendant. (p. 596.)

5. Precisely the same rules are applicable when statements are filed under the provisions of chapter 66 of Acts of 1877 by the plaintiffs. (p. 596.)
6. If the facts on either side have been proven before the jury, the court at the trial may instruct the jury, that such facts constitute no defense for the defendant and no ground of claim by the plaintiff. (p. 597.)
7. Under chapter 66 of Acts of 1877 these statements, whether filed by the plaintiff or by the defendant, are not in the nature of pleadings, but are in the nature of notices to the adverse party of the nature of the claim or defense intended to be set up against him. They resemble closely the bill of particulars, which under the provisions of the Code of West Virginia are required to be filed in actions of *assumpsit* with the declaration or with the pleas of payment or set-off, or the bill of particulars, which under the Code of West Virginia the court may require to be filed in any sort of action. (p. 598.)

Writ of error and *supersedeas* to a judgment of the circuit court of the county of Kanawha, rendered on the 9th day of April, 1881, in an action at law in said court then pending, wherein J. R. Capellar was plaintiff, and the Queen Insurance Company was defendant, allowed upon the petition of said company.

Hon. F. A. Guthrie, judge of the seventh judicial circuit, rendered the judgment complained of.

GREEN, JUDGE, furnishes the following statement of the case :

At the October rules, 1880, J. R. Cappellar filed his declaration in *assumpsit* against the Queen Insurance Company of Liverpool and London, together with the policy therein mentioned. The declaration was as follows :

“WEST VIRGINIA, KANAWHA COUNTY, TO-WIT :

“IN THE CIRCUIT COURT THEREOF.

“J. R. Cappellar complains of Queen Insurance Company of Liverpool and London, England, a corporation created under the laws of Great Britain, and existing therein and in the State of New York, who has been summoned of a plea of trespass on the case in *assumpsit* to answer this, for that the defendant, by virtue of the policy of insurance herewith filed, being fire policy No. 829,916, issued March 8, 1881, owes one thousand seven hundred and fifty dollars, with legal interest thereon from the 22d day of April, 1880, to the plaintiff, for loss in respect to the property insured by said policy caused by fire on or about the 22d day of April, 1880, at Charleston, West Virginia. And the defendant, in consideration of the premises, respectively, then and there promised to pay said sum of money to the plaintiff on request. Yet it has disregarded its promises and has not paid said sum of money, or any part thereof, to the plaintiff's damage, two thousand dollars. And thereupon he brings suit.

“LAIDLEY & HOGEMAN, P. Q.”

The policy of insurance filed with this declaration was not under the seal of the defendant, but was signed by two of the directors and the manager of said company, in New York.

Its contents so far as need be stated was as follows :

“WHEN POLICIES SHALL NOT ATTACH.

“6. In case of any false representation by the insured of the condition, situation or occupancy of the property, or any omission to make known every fact material to the risk, or on over-valuation, or any misrepresentation whatever, either

in a written application or otherwise, or if, during the continuance of this policy, or any renewal thereof, or if, at the time of such renewal there shall have been any change in the risk either within itself or by or in adjacent buildings, not made known to the company by the insured, or if the risk shall be increased or rendered more hazardous, or by the using, storing or vending in or on the premises hereby insured of any goods, wares or merchandise, or the carrying on therein of any trade, business or vocation denominated hazardous, extra or specially hazardous in the memorandum annexed to this policy, unless so written hereon, or by any changes in the occupation of the premises, or by the vacation thereof by the occupant, or by any other means whatever within the control of the insured by which the hazard is increased, then and from thenceforth this policy shall cease to attach.

"POLICIES BECOME VOID, ABSOLUTE AND UNCONDITIONAL.

"7. This policy shall be void and immediately cease to be binding on this company if the property be sold or transferred, or any alienation or change take place in title or possession, whether by legal process or judicial decree or voluntary transfer or conveyance, or if the interest of the insured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee or otherwise, be not truly stated in this policy, or if the insured has or has had, at any time during the life of this policy, any other insurance or contract for insurance, whether valid or not, on the property covered by this policy, or any part thereof, not concurrent with this policy, or covering other property in addition to the subject of this insurance, or when property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the insured has ceased and terminated.

"(NOTE.—The commencement of proceedings to foreclose a mortgage, or the levy of an execution, shall be deemed an alienation of the property, and the company shall not be holden for loss or damage thereafter.)

"CONDITIONS BY WHICH POLICIES BECOME VOID.

"8. And this policy shall also be void and immediately cease to be binding on the company in the following cases unless permission in writing on this policy is given by the

company. If the insured, or any other person or parties interested, shall have existing during the continuance of this policy any other insurance or contract or agreement for insurance allowed by the preceding condition, whether valid or not, against loss or damage by fire on the property herein described, or any part thereof, or if the insured's interest in the property insured is not absolute, or is less than a perfect title, or if this policy, or any part thereof, or any interest in it, shall be assigned, either before or after a loss, or if the premises hereby insured, or containing the property so insured, shall be occupied or used so as to increase the risk, or become vacant or unoccupied, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever, without the insured giving notice to the company and obtaining consent therefor as above provided, or if it be a manufacturing establishment, running and operating in whole or in part over or extra time, or running nights, or if it shall cease to be operated, or where gunpowder, phosphorus, fire-works (except fire-crackers and torpedoes in packages), naphtha, benzole, benzine, gasoline, or any of the volatile products of petroleum or coal oil, camphene, burning fluid, spirit gas, chemical oils, nitro-glycerine, crude, coal or earth oils, or any articles subject to legal restrictions, are deposited, stored or kept, or where vapor of gasoline, naphtha, benzine or benzole is generated on the premises or contiguous thereto, or used for light on the premises, even though the written portion insures a stock or business in which they are used (see sec. 13), or if refined coal or earth oils or kerosene in quantities exceeding five gallons are deposited, stored or kept on the premises."

At the next term of said circuit court the defendant offered to file two pleas in writing, numbered one and two, to the filing of each of which the plaintiff objected, but the court overruled the objections and permitted said pleas to filed; they were as follows:

PLEA No. 1.

"IN KANAWHA CIRCUIT COURT.

"And for a further plea the defendant says that heretofore, to-wit: On the 22d day of April, 1880, the plaintiff volun-

tarily and willfully set on fire the house in the policy described and mentioned, filed with the declaration, and that said house was then and thereby consumed by fire. And that all the loss complained of in the declaration was occasioned by the said voluntary and willful act of the said plaintiff. And this the defendant is ready to verify.

“QUARRIER, *P. D.*”

PLEA No. 2.

“IN KANAWHA CIRCUIT COURT.

“And for a further plea the defendant says, that heretofore, to-wit: On the 22d day of April, 1880, the plaintiff voluntarily and willfully caused the house in the policy described and mentioned, filed with the declaration, to be set on fire by some person or persons to the defendant unknown, and that said house was then and thereby consumed by fire, and that all the loss complained of in the declaration was occasioned by the said voluntary and willful act of the plaintiff. And this the defendant is ready to verify.

“QUARRIER, *P. D.*”

And thereupon the plaintiff replied generally to each of these pleas and put himself upon the country, and the defendant did the like. The defendant at the same time tendered a third plea in writing marked No. 3, to the filing of which the plaintiff objected, as well as to the filing of the statement of facts filed with the plea No. 3. The court overruled the objections to the filing of plea No. 3, but sustained the objection to so much of said statement accompanying plea No. 3 as is marked I. and II., and to each subdivision thereof; but the court overruled so much of said statement as is marked III. and required the defendant to amend so much of said statement as is marked I. and II. before it would allow such parts thereof to be filed. This plea No. 3 and accompanying statement are as follows:

“IN KANAWHA CIRCUIT COURT.

“And now the said defendant, for plea in this behalf, says it is not liable to the plaintiff as in the plaintiff's declaration is alleged, and this it is ready to verify.

“QUARRIER, *P. D.*”

“The defendant files the following statement with his

pleas, specifying the particular clause, condition or warranty in the policy contained in respect to which a failure or violation is claimed to have occurred :

"I. There was a violation of the 6th and 7th condition of the policy in these several particulars :

"a. The interest of the insured in the house insured was falsely stated by the plaintiff in his application for the policy and in the policy itself.

"b. The interest of the insured in the household and kitchen furniture was falsely stated by the plaintiff in the same manner.

"c. The interest of the insured in the piano and sewing machine was falsely stated by the plaintiff in the same manner.

"d. The plaintiff, at the time of the insurance, was not the owner in fee of *all* of the property insured, but had a life estate only.

"e. The plaintiff, at the time of the insurance, was not the owner of *any* of the property insured, but had a life estate only.

II. There was also a violation of the 7th condition of the policy in this :

"a. That after the policy was executed, there was a levy made of an execution or executions by an officer of the law upon a portion of the insured property.

"III. There was also a violation, on the part of the plaintiff, of the 6th condition of the policy in this : that the plaintiff represented, at the time the policy was obtained, that there was no encumbrance upon the property, when in truth and in fact there were three (3) trust-deeds executed by the plaintiff upon all or some portion of the insured property, which were duly recorded—one dated 2d May, 1879, to J. M. Payne, trustee, one dated 14th February, 1880, to Wm. S. Laidley, trustee, one other dated 4th October, 1879, to J. M. Payne, trustee.

"QUARRIER, *P. D.*

"KANAWHA COUNTY, TO-WIT :

"Nelson B. Coleman, an agent of the defendant in this suit, this day made oath before the undersigned authority that the matters of defense contained in the foregoing state-

ment will be supported by evidence at the trial of said suit.

"Given under my hand this 22d day of March, 1881.

"L. A. MARTIN,
"Notary Public."

To the decisions of the court relative to this statement, the defendant tendered a bill of exceptions No. 1 which was signed, sealed and enrolled.

On another day of the same term of the court the defendant tendered another plea in writing, marked No. 4, together with a statement of facts accompanying the same; to the filing of which statement and each part thereof, the plaintiff objected, and the court sustained said objections to so much of said statement as is marked II., and to each sub-division thereof, and refused to allow said statement to be filed until after said part numbered II. was stricken therefrom; to this action of the court the defendant excepted, and his bill of exceptions thereto, No. 2, was signed, sealed and enrolled. This plea No. 4 and the statement accompanying were as follows:

"IN KANAWHA CIRCUIT COURT.

"And now the said defendant, for plea in this behalf, says that it is not liable to the plaintiff as in the plaintiff's declaration, is alleged; and this it is ready to verify.

"QUARRIER, *P. D.*

"The defendant files the following statement with his plea, specifying the particular clause, condition or warranty in the policy contained in respect to which a failure or violation is claimed to have occurred:

"I. There was violation of the 6th condition of the policy in this:

"*a.* At the time of the application for the policy filed with the declaration, the plaintiff represented to the agent of the company, who issued the policy, that he was the owner in fee of the house and lot insured, when in truth and in fact he had only an estate therein for his own life.

"*b.* At the time of said application, a similar statement was made by said plaintiff to said agent in regard to the household and kitchen furniture and other furniture mentioned in

said policy, when in truth and in fact said plaintiff only owned a life estate therein.

"c. At the time of said application a similar statement was made by said plaintiff to said agent in regard to the piano and sewing machine mentioned in said policy, when in truth and in fact said plaintiff only owned a life estate therein.

"II. There was a violation of the 7th condition of the policy in this:

"a. The interest of the insured, the plaintiff, in the property insured was not truly stated in the policy.

"b. The policy described the house insured as 'his (the plaintiff's) two-story frame, shingle-roof dwelling,' &c., &c., 'occupied by assured,' &c., when in truth and in fact the plaintiff had only a life estate therein.

"c. The policy describes the piano as 'his' (the plaintiff's) and the sewing machine as 'his' (the plaintiff's), when in truth and in fact the plaintiff had only a life estate therein.

"III. There was also a violation, on the part of the plaintiff, of the 6th condition of the policy in this: That the plaintiff represented, at the time the policy was obtained, that there was no encumbrance upon the property, when in truth and in fact there were three (3) trust deeds executed by the plaintiff upon all or some portion of the insured property, which were duly recorded—one dated 2d May, 1879, to J. M. Payne, trustee; one dated 14th February, 1880, to Wm. S. Laidley, trustee; one other dated 4th October, 1879, to J. M. Payne, trustee.

"QUARRIER, P. D."

"KANAWHA COUNTY, TO-WIT:

"Nelson B. Coleman, an agent of the defendant in this suit, this day made oath before the undersigned authority that the matters of defense contained in the foregoing statement will be supported by evidence at the trial of said suit.

"Given under my hand this 28th day of March, 1881.

"JAMES E. MIDDLETON,

"Notary Public for Kanawha Co., W. Va."

At the same time the defendant tendered another plea in writing, numbered five, with a statement of facts appended thereto; and thereupon the plaintiff objected to the state-

ment of facts and each part thereof, and the court sustained the same as to so much of said statement as is marked II., and to each sub-division thereof, and the court overruled the said objections as to so much of said statement as is marked I. and III., and to each sub-division thereof, and refused to allow said statement of facts to be filed, unless said portion thereof marked II. and each sub-division thereof be stricken from said statement; and to this action of the court, in reference to those portions of said statement marked II., the defendant excepted and filed his bill of exceptions No. 3, which was signed, sealed and enrolled. This plea No. 5 and accompanying statement were in the words:

"IN KANAWHA CIRCUIT COURT.

"And now the said defendant, for plea in this behalf, says that it is not liable to the plaintiff as in the plaintiff's declaration is alleged, and this it is ready to verify.

"QUARRIER, *P. D.*

"The defendant files the following statement with his plea, specifying the particular clause, condition or warranty in the policy contained in respect to which a failure or violation is claimed to have occurred:

"I. There was a violation of the 6th condition of the policy in this:

"a. At the time of the application for the policy filed with the declaration, the plaintiff represented to the agent of the company, who issued the policy, that he was the owner in fee of the house and lot insured, when in truth and in fact he had only an estate therein for his own life.

"b. At the time of said application a similar statement was made by said plaintiff to said agent in regard to the household and kitchen furniture mentioned in said policy, when in truth and in fact said plaintiff only owned a life estate therein.

"c. At the time of said application a similar statement was made by said plaintiff to said agent in regard to the piano and sewing machine mentioned in said policy, when in truth and in fact said plaintiff only owned a life estate therein.

"II. There was a breach of the 8th condition of the policy in this:

"a. At the time the policy was issued the insured interest

in the property insured was not absolute, for the reason that his interest was a life estate and not an estate in fee.

"*b.* At the time the policy was issued, the title of the insured to the property insured was less than a perfect title; he had an estate for life and not an estate in fee.

"*c.* There was no permission endorsed on the policy by the company that the policy should be issued to the insured, notwithstanding the fact that he had only a life estate in the property insured and not an estate in fee.

"III. There was also a violation on the part of the plaintiff of the 6th condition of the policy in this: that the plaintiff represented, at the time the policy was obtained, that there was no encumbrance upon the property, when in truth and in fact there were three (3) trust-deeds executed by the plaintiff upon all or some portion of the insured property, which were duly recorded—one dated 2d May, 1879, to J. M. Payne, trustee, one dated 14th February, 1880, to Wm. S. Laidley, trustee, and one other dated 4th October, 1879, to J. M. Payne, trustee.

"QUARRIER, *P. D.*

"KANAWHA COUNTY, TO-WIT:

"Nelson B. Coleman, an agent of the defendant in this suit, this day made oath before the undersigned authority that the matters of defense contained in the foregoing statement will be supported by evidence at the trial of said suit.

"Given under my hand this 29th day of March, 1881.

"JAMES E. MIDDLETON,

"*Notary Public for Kanawha Co., W. Va.*

"And thereupon the said defendant tendered a special plea in writing, marked No. 6, with a statement of facts annexed thereto, and the plaintiff objected to the statement and each part thereof, but the court overruled the objections and ordered said plea No. 6 and said statement to be filed, and it was accordingly done."

Plea No. 6 and the accompanying statement were as follows:

"IN KANAWHA CIRCUIT COURT.

"And now the said defendant for plea in this behalf says:

"That it is not liable to the plaintiff as in the plaintiff's declaration is alleged, and this it is ready to verify.

"QUARRIER, *P. D.*

"The defendant files the following statement with his plea, specifying the particular clause, condition or warranty in the policy contained, in respect to which a failure or violation is claimed to have accrued:

"I. There was a violation of the 6th condition of the policy in this:

"(a.) At the time of the application for the policy filed with the declaration, the plaintiff represented to the agent of the company who issued the policy, that he was the owner in fee of the house and lot insured, when in truth and in fact he had only an estate therein for his own life.

"(b.) At the time of said application a similar statement was made by said plaintiff to said agent in regard to the household and kitchen furniture, and other furniture mentioned in said policy, when in truth and in fact said plaintiff only owned a life estate therein.

"(c.) At the time of said application a similar statement was made by said plaintiff to said agent in regard to the piano and sewing machine mentioned in said policy, when in truth and in fact said plaintiff only owned a life estate therein.

"III. There was also a violation on the part of the plaintiff of the 6th condition of the policy in this, that the plaintiff represented at the time the policy was obtained, that there was no encumbrance upon the property, when in truth and in fact there were three (3) trust-deeds executed by the plaintiff upon all or some portion of the insured property, which were duly recorded; one dated 2d May, 1879, to J. M. Payne, trustee; one dated 14th February, 1880, to Wm. S. Laidley, trustee; one other dated 4th of October, 1879, to J. M. Payne, trustee.

"QUARRIER, P. D.

"KANAWHA COUNTY, TO-WIT:

"Nelson B. Coleman, an agent of the defendant in this suit, this day made oath before the undersigned authority, that the matter of defense contained in the foregoing statement, will be supported by evidence at the trial of said suit.

"Given under my hand this 29th day March, 1881.

"JAMES E. MIDDLETON,

"Notary Public for Kanawha County, W. Va."

At another day during the same term, on April 1, 1881, the plaintiff tendered a reply in writing, marked No. 1, to the defendant's pleas with a statement in writing attached to such reply, and the defendant objecting thereto, the court sustained the objections to the sub-divisions of said statement marked respectively V., VI., VII. and VIII., and refused to permit said reply and statement to be filed, unless such sub-divisions V., VI., VII. and VIII. were stricken therefrom; and thereupon the plaintiff tendered a reply in writing, marked No. 2, to the defendant's pleas with a statement in writing attached to said reply, which by leave of the court was filed. The plaintiff's said replies and accompanying statements were as follows:

REPLY No. 1.

"IN CIRCUIT COURT OF KANAWHA COUNTY.

"And now comes the plaintiff, and by way of joinder of issues to the pleas filed by defendant to plaintiff's declaration in the above entitled action, says that he replies generally to said pleas and each of them.

"LAIDLEY & HOGEMAN, P. Q."

STATEMENT No. 1.

"The plaintiff files the following statement of matters upon which he intends to rely in waiver or estoppel, or by way of confession and avoidance of the matters stated in the statements, and each of them, filed by the defendant in this action:

"I. The agent of the defendant who issued the policy filed with the declaration in this action, knew at the time of issuing said policy how the plaintiff derived his interest in the house insured by said policy, and then knew what such interest was.

"II. The agent of the defendant who issued the policy filed with the declaration in this action, knew at the time of issuing said policy how the plaintiff derived his interest in the household and kitchen furniture and the other furniture insured by said policy, and then knew what such interest was.

"III. The agent of the defendant who issued the policy filed with the declaration in this action, knew at the time of

issuing said policy how the plaintiff derived his interest in the piano and sewing machine insured by said policy, and then knew what such interest was.

“IV. The agent of the defendant who issued the policy filed with the declaration in this action, knew at the time of issuing said policy that the three deeds of trust mentioned in defendant’s statement filed with plea No. 6, had been executed by plaintiff, and were encumbrances on a portion of the property insured by said policy.

“V. The agent of the defendant who issued the policy filed with the declaration in this action, knew at the time of issuing said policy that there were encumbrances upon a portion of the property insured by said policy.

“VI. The value of the plaintiff’s interest in the property included in the deeds of trust, other than that described in the policy filed with the declaration in this action, was of greater value than the aggregate of the indebtedness for which such deeds of trust were given as security, and of all other liens or encumbrances on such property, and therefore knowledge by the defendant, or its agents, of the existence of such deeds of trust was not material to the risk.

“VII. The agent of the defendant who issued the policy filed with the declaration in this action, in issuing said policy did not rely upon any representations of plaintiff in regard to the ownership of the property insured by said policy or of any encumbrances on such property, but informed himself on these subjects from other sources and issued such policy on the faith of the information derived from such other sources, and not in reliance on any representations of plaintiff such as are set forth in defendant’s statement.

“VIII. The matter stated in the statement in writing filed with the defendant’s pleas are untrue.

“LAIDLEY & HOGEMAN, *P. Q.*

“WEST VIRGINIA, KANAWHA COUNTY, TO-WIT:

“J. R. Cappellar, the plaintiff in the above entitled action, being duly sworn, says that he believes the matters of reply stated in the foregoing statements will be supported by evidence at the trial of said action.

“J. R. CAPPELLAR.

"Subscribed and sworn to before me this 1st day of April, 1881.

"THOMAS SWINBURN,
"Clerk Kan. Cir. Ct."

REPLY No. 2.

"And now comes the plaintiff, and by way of joinder of issue to the pleas filed by defendant to plaintiff's declaration in the above entitled action, says that he replies generally to said pleas and each of them.

"LAIDLEY & HOGEMAN, P. Q."

STATEMENT No. 2.

"The plaintiff files the following statement of matters upon which he intends to rely in waiver or estoppel, or by way of confession and avoidance of the matters stated in the statements, and each of them, filed by the defendant in this action:"

(Then follows Nos. I., II., III. and IV. as in statements. No. I. signed Laidley & Hogeman, P. Q.)

"Subscribed and sworn to before me this 1st day of April, 1881.

"THOMAS SWINBURN,
"Clerk Kan. Cir. Ct."

A jury was sworn to try the issue joined, and on April 6, 1881, found a verdict for the plaintiff and assessed his damages at one thousand eight hundred and twenty-eight dollars and seventy-five cents. And on April 9, 1881, the court overruled a motion for a new trial, and entered up a judgment for the plaintiff against the defendant for one thousand eight hundred and twenty-eight dollars and seventy-five cents with interest from April 7, 1881, and costs, including ten dollars as allowed by law. From this judgment this Court has granted the defendant a writ of error and *supersedeas*.

William A. Quarrier for plaintiff in error:

1. The statement to be filed with the plea required by chapter 66, Acts 1877, is in effect a mere notice, and if it be sufficient to notify the adverse party in effect of the nature of the defense, it ought not to be rejected. Sec. 4 ch. 66, Acts 1877.

2. If the person insured, falsely states the interest or estate which is insured in the application, it renders the policy void. Or if such interest be falsely stated in the policy, the policy is void. 1 Phill. on Ins. §§ 534, 537.

3. The policy having provided that a levy of an execution upon any portion of the property insured, should avoid the policy, this clause of the policy is legal, and defendant is entitled to the benefit of it.

4. When the policy describes the property insured as "my" property, when in fact, the insured only owns a life estate, this avoids the policy. 1 Phill. Ins. § 874 a, p. 474; *Leathers v. Farmers' Ins. Co.*, 24 N. H. 259; 4 Waits' Actions and Defences, p. 22, and authorities there cited.

5. When the declaration alleges that the policy issued 8th March, 1881, and the fire occurred 22d April, 1880, the policy is void, and if a verdict has been rendered on the declaration, it should be set aside, and a new trial awarded.

Laidley & Hogeman for defendant in error cited the following authorities: 4 Wall. 188; 6 Gratt. 673; 17 Wall. 411; 13 W. Va. 202; 23 Ohio St. 578; 9 Leigh 347; 4 Rand. 192; Acts 1877 ch. 66.

GREEN, JUDGE, announced the opinion of the Court:

The question in this case is: When a declaration in an action on a policy of insurance is filed in the form prescribed by chapter 66, of Acts of 1877, section 1, and a plea is filed by the defendant in the form prescribed by the act, and issue is joined thereon as prescribed in section five of said act, and the plaintiff or defendant or both of them without being required so to do by the court under sections two and three of this act files under sections four and five of this act the statements in writing referred to in these sections, should the court regard these statements, as if they were a portion of the pleadings in the case, and refuse to permit them or any portion of them to be filed, because when offered to be filed the court is of opinion, that such statements, or any particular part thereof, do not allege facts, which in the opinion of the court constitute, if true, a defense to the action; or when offered to be filed by the plaintiff do not state facts, which in

the opinion of the court constitute, if true, a good rejoinder by the plaintiff to the facts embraced in the statement filed with the defendant's plea; or under the sixth section of said Act of 1877 should the court strike out such statement filed by either party, or any part thereof, when such statement or part thereof is *sufficient to notify the adverse party in effect of the nature of the claim or defense intended to be set up against him or even when such is not the case?* In other words: Under this chapter 66 of the Acts of 1877 should these statements be regarded in the nature of pleadings, and as being liable to be stricken out by the court, if they be such, as if formally pleaded, would have been liable to demurrer; or under this act are these statements similar to the bill of particulars or account, which the plaintiff is required in an action of *assumpsit* to file with his declaration by section 11, chapter 125 of Code of West Virginia; or to the account of payments and set-off which the defendant is required to file with his plea by section 4 chapter 126 of the Code of West Virginia, it being well settled, that these bills of particulars or accounts filed with the pleadings are not in the nature of pleading, but are to be regarded merely as notices of what will be proven at the trial; and if they are too vague, the penalty imposed on the party filing them is the exclusion of his evidence of any matters not described in such bill of particulars or account so plainly as to give the adverse party notice of its character, and by the 46th section of chapter 131 of Code of West Virginia, the court is authorized in any action or motion to order either party to file such bill of particulars, which the statute provides shall be subject to the same rules and be regarded in like manner as the bill of particulars filed in an action of *assumpsit*, or with pleas of payment or set-off?

Section 4 of chapter 66 of Acts of 1877, is as follows: "To any declaration or count in a policy of insurance, whether the same be in the form prescribed by this act or not, and whether the action be covenant, debt or *assumpsit*, the defendant may plead, that he is not liable to the plaintiff, as is in said declaration alleged. But if in any action on a policy of insurance the defense be that the action can not be maintained because of the failure to perform or comply with, or violation of any

clause, condition or warranty in upon or annexed to the policy, or contained in or upon any paper, which is made by reference a part of the policy, the defendant must file a statement in writing specifying by reference thereto or otherwise, the particular clause, condition or warranty in respect to which such failure or violation is claimed to have occurred; and such statement must be verified by the oath of the defendant, his officer, agent or attorney-at-law to the effect, that the affiant believes that the matter of defense therein stated will be supported by evidence at the trial." And the sixth section of said act is as follows: "If either party to the action fail to file any statement required of him by this act, or by the other party pursuant to this act, or if the statement be adjudged insufficient in whole or in part, the court, as justice may require, may grant further time for filing the same, or permit the statement filed to be amended, or may at the trial exclude the evidence offered by the party in default as to any matter he has so failed to state, or has insufficiently stated. But no statement, which in the particulars required by or under this act to be stated, or referred to therein is sufficient to notify the adverse party in effect of the nature of the claim or defense intended to be set up against him, shall be adjudged insufficient."

This Court has repeatedly decided, what it seems to me was perfectly clear under the statute independently of any decision, that a bill of particulars or account filed with an action of *assumpsit* or with a plea of payment or set-off under our Code, if defective, could be taken advantage of by the opposite side not by demurrer, but only by moving to exclude the evidence from the jury, which might be offered to sustain such imperfect bill of particulars or account, and that such bill of particulars or account constituted no part of the pleadings in the case. See *Choen v. Guthrie et al.*, 15 W. Va. p. 113 and 114; *Abell v. Penn Mutual Life Ins. Co.*, 18 W. Va. 412, 413; *Smith v. Townsend*, *supra*.

Now it does seem to me quite obvious, that this chapter 66 of the Acts of 1877, p. 89, was simply intended to extend the provisions of the Code of West Virginia, to which we have referred as requiring in certain cases a bill of particulars to be filed with the declaration, plea or rejoinder, as the

case might be, to actions on policies of insurance brought under this act, and that it was required, that the statement to be filed under chapter 66 of Acts of 1877 in actions on policies of insurance, when not those ordered by the court to be filed, were to stand in exactly the same relation to the case as did these bills of particulars now required to be filed under the Code. When such bills of particulars were filed in actions of *assumpsit* with the declaration, or were filed by the defendant with his pleas of payment or set-off, the court did not and could not properly pass on their sufficiency when filed. But if they turned out to be so vague as not to give plainly to the adverse party notice of their character, he was protected from resulting injury not by striking them out when offered to be filed because of their insufficiency but by excluding any evidence, that might be offered to sustain any item in his bill of particulars too vaguely described to give the adverse party notice of its character. This was certainly ample protection against vague and insufficient bills of particulars.

When however, the law itself did not require the filing of such bills of particulars, but under section 46 of chapter 131 of Code of West Virginia the filing of such bill was required by the order of the court in every action, I presume the court might supervise the bill of particulars, which was filed by its order, and if it deemed it insufficient in whole or in part might give further time for filing the same, or permit the bill of particulars filed to be amended, or might at the trial exclude the evidence offered by the party in default as to any matter, which he had failed to state in his bill of particulars, or as to any matter which the court had adjudged that he had insufficiently stated.

Section 46 of chapter 131 of the Code of West Virginia expressly provides, that the court may, when the case is tried, exclude evidence of any matter not described in such bill of particulars filed under the order of the court, when the matter is not described so plainly as to give the adverse party notice of its character. And it seems but reasonable, that where the bill of particulars is filed by the order of the court, the court should inspect it when filed, and if called upon by the parties to determine the question, then decide whether it

was so plain as to give the other party notice of its character, and enter on the record the adjudication whether such bill of particulars was or was not sufficient, that is, was or was not so plain as to notify the adverse party to the action of the claim or defense intended to be set up against him. For it is obvious under section 46 of chapter 131 of the Code of West Virginia, and under the decisions of this Court in *Choen v. Guthrie et al.* 15 W. Va. 113, 114; *Abill v. Penn Mutual Life Insurance Co.*, 18 W. Va. 412, 413 and *Smith v. Townsend*, *supra*, that the court could not adjudge such bill of particulars insufficient for any other reason than because it was too vague to notify the adverse party of the nature of the claim or defense intended to be set up against him. It could not adjudge it insufficient, when it was not too vague, merely because the court was of opinion, that the defense or rejoinder intended to be relied on was not good in law, for this would be to hold such bill of particulars liable to a general demurrer, which, we have decided, it is not.

This being, as I conceive, the state of the law with reference to bills of particulars when chapter 66 of Acts of 1877 was passed, it does seem to me, that section 6 of that act indicates clearly, that the statements either required by the law to be filed with the pleadings in actions on policies of insurance, or which might be required by the order of the court to be filed, were intended to stand upon the same footing as bills of particulars had previously stood. That is to say that the statement, which under section 4 of chapter 66 of Acts of 1877 *must* be filed by the defendant with his plea, can in no case be adjudged insufficient by the court, whether it presented a ground of defense or not, or whether or not it was too vague or indefinite to notify the plaintiff in effect of the nature of the defense intended to be set up against him. But if it was insufficient because it presented no ground of defense, or because it was too vague or indefinite to notify the plaintiff of the defense intended to be set up against him, the court on the trial of the case might declare it insufficient, and on motion of the plaintiff might exclude all evidence offered to sustain any fact alleged in such statement, which would constitute no defense or which was so vague as not to

notify the plaintiff in effect of the nature of the defense intended to be set up against him.

But if under section 3 of chapter 66, Acts of 1877, the court or judge ordered the defendant, in its discretion, to file with his plea a more particular statement in any respect of the nature of his defense, or of the facts expected to be proved at the trial, then if such statement was too vague to notify the plaintiff in effect of the nature of the defense intended to be set up against him the court might, if the plaintiff by motion asked it, adjudge such statement insufficient in whole or in part and enter said adjudication of record, and thereupon as justice may require, it should grant further time for filing a sufficient statement or permit the statement, which had been filed to be amended; but in no case should it refuse to permit the statement offered by the defendant to be filed. If the statement is adjudged insufficient because of its vagueness, or if it be in point of fact insufficient on account of its vagueness, and no entry be made adjudging whether it be insufficient or not, at the trial the court may exclude on the plaintiff's motion evidence offered by the defendant in default as to any matter which he has after such order failed to state, or which he has so insufficiently stated as not to notify the plaintiff in effect of the nature of the defense intended to be set up against him; and also any matter whether stated in such statement or not, as constitutes in law no defense.

The same rules must be applied to the plaintiff. If he files with joinder in issue under the fifth section, where he intends to rely upon any matter in waiver, estoppel or in confession and avoidance of any matter, which may have been stated by the defendant as aforesaid, a statement in writing, which he must do, specifying in general terms the matter, on which he intends to rely, the court cannot refuse to permit such statement to be filed or adjudge it at the time it is offered to be insufficient on any account; but if it be insufficient, because the matter relied on is not good in law as a rejoinder to the defense, or because it is insufficient because of its vagueness to notify the defendant in effect of the nature of the plaintiff's claim or rejoinder intended to be set up against the defendant, the court on the

trial and on the motion of the defendant should exclude the evidence if offered by the plaintiff in defense as to any matter, which he has so failed to state, or which he has insufficiently stated, or which though stated constituted in law no rejoinder or answer to the defense.

But if the plaintiff does not file the statement under the fifth section but files it under the third section, because ordered by the court so to do, then if called upon to do so by the defendant, the court may enter of record, that this statement is insufficient, provided it does not notify in effect the defendant of the nature of the claim or rejoinder of the plaintiff intended to be set up against the defendant; but the court can not enter of record, that such statement of the plaintiff is insufficient because, in its judgment, it does not as a matter of law set up a good claim against the defendant, or does not set up a good rejoinder against his defense. But the court may on the trial of the case, on the motion of the defendant, reject such of the plaintiff's evidence as is offered to prove any matter, which he has failed to state, when required, in his statement, or which he has so insufficiently stated, or which though stated constitutes no evidence of a claim on his part, or no rejoinder to the defendant's defense. Or if the evidence has gone before the jury, whether for the plaintiff or defendant, the court may instruct the jury as to the effect of the proof of such facts upon the rights of the opposite party.

It is true, that the 6th section of chapter 66 of Acts of 1877 is somewhat obscurely worded; but in view of what was the previous law in reference to bills of particulars, whether filed by the plaintiff or defendant, and whether under the requirement of the law or under the order of the court, we think we have given the fair construction to the section. It is said, that by thus leaving everything to be determined by the court as to the law of the case at the trial of the case, and by dispensing with everything like definite pleadings, this act will practically render the actions on policies of insurance more difficult than they were before the passage of this act. This may be so. The Legislature however seems to have thought differently; whether wisely or not, time alone can determine.

If on the other hand these statements, as they are called in

this act should, contrary to the very meaning of the term, be regarded as pleadings, and have the rules of pleading applied to them, it seems to me to be very obvious, that the Legislature would by this act have increased the difficulties of trying actions on policies of insurance. For the difficulty in such cases was not the formal averments made in the pleadings, but was that of determining what averments were required to be made in the declaration, plea and rejoinder; and this difficulty is in no manner diminished by requiring these averments, instead of being made on the face of these pleadings, to be made in these statements filed with the pleadings, if when so made they are to be regarded just as if they had been made formally in the body of the pleading, and are as subject to demurrer when in these statements as they were when in the pleadings. The difficulty of deciding on these pleadings instead of being diminished by this new mode of pleading would only be increased; as it would often become almost impossible for the court in the informal manner, in which the facts are set out in these statements, to determine whether they constituted a good defense or rejoinder or not. This can be much more safely done, if formal pleadings are dispensed with, at the trial, when all the facts are developed; and these statements will, it is supposed, suffice to prevent surprise, which is, I think, all that they were intended to effect.

In this case the policy was not under the seal of the company but was signed by two directors and a manager in New York, and the form of the action was properly *assumpsit*.

According to the views, which we have expressed, the court below erred in refusing to allow that portion of the statement marked I. and II., which accompanied plea No. 3, and each sub-division thereof to be filed. It also erred in refusing to allow that portion of the statement, marked I. and II., which accompanied plea No. 4, and each sub-division thereof to be filed; and also in refusing to allow that portion of the statement marked II., which accompanied plea No. 5, and each sub-division thereof to be filed. All these statements were such as the 4th section of chapter 66 required the defendant to file, and none of them were statements, which under the 3d section of the said act were filed by order of the court;

and therefore the court had no right to refuse to permit the whole or any part of them to be filed, whether they set up an insufficient defense or not, or whether or not they were too vague to notify the plaintiff in effect of the nature of the defense intended to be set up against him. In either of these cases it was the right of the plaintiff on the trial to move to exclude the evidence offered by the defendant to sustain the averments of facts contained in these statements filed with his pleas; or if the evidence had been received, the plaintiff could have asked the court to instruct the jury, that the facts constituted no defense. But it had no right to ask the judgment of the court on these questions till the trial of the case before the jury. The court could not advisedly or legally determine these questions, when these statements were filed, but could do so only at the trial. In like manner and for a like reason the court below erred in sustaining the defendant's objections to the plaintiff's statement in his reply marked No. 1, so far as said objections relate to the sub-divisions of said statement marked respectively V., VI., VII. and VIII., and in requiring them to be stricken out. The matter thus determined by the court could only have been properly determined at the trial and in the manner above indicated.

The plaintiff by a blunder stated in his declaration, that the policy sued on issued on March 8, 1881, while the policy itself filed with the declaration as a part thereof on its face shows, that it was issued on March 8, 1880. It is unnecessary to decide whether this was a fatal blunder after the verdict, as the verdict and judgment for the errors, which we have pointed out, must be set aside and a new trial awarded, and leave must be given the plaintiff to amend his declaration, which he can do by inserting the correct date of the policy.

It is insisted by the counsel for the plaintiff below, the defendant in error, that plea No. 5 and the accompanying statement are not parts of the record in this case, because having been rejected they could only be preserved in the records by being incorporated in a bill of exceptions. On the other hand it is insisted, that they are by reference sufficiently incorporated in bill of exceptions No. 3. We need

not determine this question as the judgment, which we would render, could not be affected by its determination, because there are, as we have seen, sufficient errors to reverse this case, whether this plea and statement are regarded as a part of the record or not. In stating the case we have treated them as a part of the record. This question cannot again arise; and it is useless to consider or determine it, as it will be by our decision in effect no longer a question in the case.

As we have held, that the circuit court improperly acted upon and decided what would constitute a good defense in this action, and what would not, when these various statements were filed, we of course cannot properly consider these questions, which have been argued before us on the pleadings in this case; they can only be properly decided on the trial, and we can neither wisely nor properly determine them in this stage of the case. It is most probable, that a large majority of them will never come before the circuit court to be decided. This of itself is a strong reason, why the court should not be called upon to decide these questions, when the statements are filed; as very many of them may turn out to be mere abstract questions. Instead of filing several different pleas "that the defendant for plea in this behalf says it is not liable to the plaintiff as in the plaintiff's declaration is alleged and this he is ready to verify," but one such plea should have been filed, and all the various statements should have been filed with it; and so there should have been one reply and one statement accompanying such reply.

For the reasons we have stated the judgment of the circuit court of Kanawha county rendered on April 9, 1881, must be set aside, reversed and annulled; and the plaintiff in error, Queen Insurance Company, must recover of the defendant in error J. R. Cappellar, its costs in this Court expended; and this Court proceeding to render such judgment, as the circuit court of Kanawha county should have rendered, doth set aside the verdict of the jury rendered in this action, and doth award a new trial, the cost of the former trial to abide the result of the suit; and this case is remanded to the circuit court of Kanawha county with directions to permit the

plaintiff to amend his declaration, and to permit the defendant to withdraw any of his pleas and to file a new plea or pleas, and with further instructions to proceed with this case on the principles laid down in this opinion, and further according to law.

JUDGES JOHNSON AND SNYDER CONCURRED.

JUDGMENT REVERSED. CASE REMANDED.

WHEELING.

JACKSON'S ADM'R v. HULL.

Submitted April 14, 1883—Decided April 28, 1883.

1. Since the disuse of special replications in equity practice, if a bill in equity shows on its face that the relief it prays for is barred by the lapse of time, advantage may be taken of such bar by demurrer as well as by plea. (p. 610.)
2. Where a suit is brought by a lien-creditor against his debtor to subject the lands of the latter to the payment of his debt, and during the pendency of such suit another lien-creditor of such debtor, by leave of the court, files his petition in said suit and is made a party thereto, and process is ordered against the defendant to answer such petition, which is not issued at once but is subsequently issued and duly served on the defendant. **HELD :**
That in such case the statute of limitations ceases to run against the debt of such petitioner at the time he files his petition and not at the time, when the process to answer it is served on the defendant. (p. 611.)
3. The eighth, ninth and eleventh points in the syllabus in *Neely v. Jones*, 16 W. Va. 628, and the second point in the syllabus in *Norris, Caldwell & Co. v. Bean*, 17 *Id.* 655, approved and applied. (p. 614.)

Appeal from and *superseas* to a decree of the circuit court of the county of Wood, rendered on 8th day of April, 1880, in a cause in said court then pending, wherein Henry J. Jackson's administrator was plaintiff, and R. M. T. Hull was defendant, allowed upon the petition of said Hull.

21	601
34	220
21	601
36	18
21	601
41	582
21	601
42	817
21	601
45	183
45	348
21	601
46	593
21	601
48	452
21	601
49	290
49	646
21	601
51	590
51	617
51	638
52	533

Hon. James M. Jackson, judge of the fifth judicial circuit, rendered the decree appeal from.

SNYDER, JUDGE, furnishes the following statement of the case:

Lydia Jackson, administratrix of Henry J. Jackson, deceased, filed her bill in the clerk's office of the circuit court of Wood county at April rules, 1875, against R. M. F. Hull to subject the real estate of the defendant to the payment of two judgments recovered by her against the defendant; that by an order entered, on the 10th January, 1876, the cause was referred to Commissioner Powell with directions to him to ascertain and report what real estate the defendant owned at the date of the plaintiff's judgments, what portion of said real estate he had since conveyed, when and to whom conveyed, the liens thereon with their amounts, character and priorities, and any other matters deemed pertinent by him or required by either party, and directing said commissioner, before executing said order to give notice to the defendant.

The said commissioner made and filed his report which was, by decree of January 8, 1877, confirmed without exception and the real estate of the defendant, therein described, decreed to be sold to pay the plaintiff's judgments and her costs. Subsequently, W. B. Caswell and S. M. Peterson, by leave of the court, filed their joint petition in said suit, in which they allege, that at the April term, 1867, of the circuit court of Wood county they obtained against the defendant, Hull, and one E. H. Hensley a decree for one thousand two hundred and seventy-one dollars, with interest on six hundred and thirty-five dollars and fifty cents part thereof from April 15, 1866, and on six hundred and thirty-five dollars and fifty cents, the residue thereof, from July 16, 1866, till paid and fifteen dollars and ninety-eight cents costs, and that said decree had been duly docketed upon the judgment-lien docket of said county on the 9th day of February, 1876, that no part of said decree had been paid, and that the same operated as a lien on the real estate of the defendant in the plaintiff's bill mentioned. The prayer is, that the petitioners may be made parties plaintiffs to said suit, that the said report of Commissioner Powell may be recommitted and

their said debt reported therein and paid according to its priority, &c.

The plaintiff having departed this life, the cause was, by an order of the court, revived in the name of B. P. Marshall as administrator *de bonis non* of the estate of said Henry J. Jackson and, by a decree entered on the 27th of September, 1877, after reciting therein that the court is of opinion that the petitioners, W. B. Caswell and S. M. Peterson, are entitled to the relief prayed for in their petition, the said report of Commissioner Powell was recommitted to him with instructions to amend the same by reporting the said debt of petitioners and all other liens upon the real estate of the defendant with their amounts and priorities, and, also, the real estate owned by the defendant at the dates of such respective liens, and any other pertinent matter, and directing the said commissioner before executing said order to give notice to the parties.

The said commissioner made his report, dated January 31, 1878, and filed the same, from which it appears, that the following debts were liens on said real estate:

1st. The two judgments in favor of the plaintiff, rendered July 7, 1866, and docketed January 8, 1869;

2d. A trust-deed to secure a debt due H. W. Buckley, recorded September 2, 1869;

3d. A trust-deed to secure a debt to the Parkersburg Mill Company, recorded July 20, 1874;

4th. The decree in favor of petitioners, W. B. Caswell and S. M. Peterson, docketed February 17, 1876;

5th. Judgments in favor of:

1. Braiden, Ruth & Co., rendered at September term, 1867;

2. A. B. Clark & Bro., rendered October 31, 1870;

3. M. P. Amiss, rendered at the December term, 1875;

4. J. H. Haun & Co., rendered at the December term, 1876; and

5. Jenkins, Jackson & Co., rendered at December term, 1876.

The said report, also, contains a statement and description of all the real estate owned by the defendant at the time or since the date of the plaintiff's judgments, also the aliena-

tions of said real estate made by the defendant, the date of each and the names of the persons to whom alienated—the whole thereof having been conveyed by the defendant prior to the date of the report. The facts in relation to said real estate and the alienations thereof by the defendant sufficiently appear from the recitals in the decree of April 8, 1880, hereinafter given, and it is therefore, deemed unnecessary to state them here.

The defendant excepted to said report:

First—Because, it is claimed, that the facts show that the debt of the petitioners, W. B. Caswell and S. M. Peterson, on which they obtained their decree of April 20, 1867, was paid prior to the date of said decree, and that said decree was, subsequent to said payment, obtained by fraud; and because the right to enforce the lien of said decree, even if it were otherwise valid, was barred by the statute of limitations at the time their petition was filed in this cause; and therefore, the commissioner has improperly reported said decree as a lien on the lands in the report mentioned or any part thereof;

Second—Because, the commissioner reports the trust-debt of H. W. Buckley as a lien on said real estate, the said debt having been satisfied by the acceptance of other security; and

Third—Because the said report allows the judgments of Braiden, Ruth & Co., A. B. Clark & Bro., M. P. Amiss, J. H. Haun & Co. and Jenkins, Jackson & Co., as liens on the purchase-money due from T. C. and G. S. Hull for land conveyed to them by the defendant.

By decree of March 5, 1880, on the motion of defendant and by consent of the plaintiff the aforesaid decree of sale of January 8, 1877, was set aside, and the defendant demurred to and answered, respectively, the plaintiff's bill and the petition of W. B. Caswell and S. M. Peterson, to which respective answers the plaintiff and said petitioners replied generally. No question being raised in this Court in respect to the matters set out in defendant's answer to the plaintiff's bill, any statement of said answer is omitted. In his answer to the said petition the defendant avers, that the only foundation for the alleged decree, in said petition mentioned, was

two notes for six hundred and thirty-five dollars and fifty cents each, given by him and E. H. Hensley as partners to said W. B. Caswell, S. M. Peterson and E. H. Hensley as partners for property purchased by respondent and said Hensley from said last mentioned firm of which the said Hensley was also a partner and as such owning one third of the property so purchased and for which said notes were given; that said notes being the property of said partnership, the said Hensley, as a partner thereof, was entitled to one third of same, and accordingly, respondent, prior to the institution of the suit in which said pretended decree was obtained, paid said one third of the amount of said notes to said Hensley, and that, after the institution of said suit and before the hearing thereof, he had a settlement with said W. B. Caswell in which the residue of said two notes was settled and paid, that said Caswell then and there agreed to dismiss said suit, and respondent, relying upon said agreement, gave no attention to said suit, believing the same had been dismissed, and he never knew or suspected otherwise until the said petition was filed in this suit; that said debt is unjust and the said decree was procured by fraud and misrepresentation; that no execution had ever been sued out on said decree or demand made for its payment prior to the filing of said petition, and that, therefore, the right to enforce the payment thereof is barred by the statute of limitations.

Depositions were taken by said petitioners and the defendant to sustain the averments respectively of said petition and answer. And, on the 8th day of April, 1880, the following decree was entered, which I give in full for the reason that it contains the results of the report of Commissioner Powell and other facts necessary to an intelligent understanding of the matters complained of by the appellant, as succinctly stated as could otherwise be done:

"This cause came on this day to be heard upon the papers formerly read, and the orders and decrees heretofore made herein, the demurrer and answer of R. M. F. Hull to the plaintiff's bill, and general replication to said answer, the demurrer and answer of the said Hull to the petition filed in this cause by W. B. Caswell and S. M. Peterson, and the replication to said answer, the report and supplemental report

of Barna Powell one of the commissioners of this Court made and filed in this cause, and the exceptions of the said R. M. F. Hull thereto, and the demurrer to said bill and to said petition being argued by counsel, the court is of opinion that the said bill and said petition is each sufficient in law and doth overrule the demurrer both to said bill and said petition; and upon consideration of the exceptions to said commissioner's report, the court doth overrule the first exception, because the same is not well taken, and the court doth sustain the second and third exceptions to the said report, and the said report is in all things confirmed, except as to the lien reported in favor of H. W. Buckley, referred to in said second exception, which the court finds is not a lien upon the real estate as therein reported, and except as to the matters contained in the third exception, it appearing from said report that the creditors therein mentioned not having docketed their said judgments prior to the sale of said property to the said T. C. and G. S. Hull, have no lien upon the property to them conveyed, and therefore have no lien in this suit upon the funds in their hands as reported by the commissioner. And it appearing to the court from said report that at the date of the complainant's said judgments the defendant was the owner of the following real estate, viz:

*“First—*A lot of ground conveyed to the defendant by deed dated March 5, 1864, and fully described by Exhibit ‘D’ filed with complainant's bill.

*Second—*A lot conveyed to the defendant by D. E. Hutchinson and wife by deed dated August 16, 1864, and fully described in Exhibit ‘E’ filed with complainant's bill.

*“Third—*An undivided one half of a lot of land conveyed to the defendant by William Logan and wife by deed bearing date August 30, 1861, and March 26, 1872, which lot is fully described in said commissioner's report.

*“Fourth—*A certain other lot of land conveyed to the defendant by Wm. A. Tefft and wife by deed dated the 2d day of January, 1865, which lot is fully described in said commissioner's report.

*“Fifth—*A lot of land conveyed to said defendant by William S. Grant and wife by deed bearing date October 25, 1867, and fully described in said report.

“And it further appearing to the court from said report that since the rendition of the judgments in favor of complainant’s intestate the said defendant has sold and conveyed divers portions of said real estate so owned by him by deeds of record in this county—that is to say:

“To Wm. B. Caswell, by deed dated April 1, 1867, and admitted to record April 2, 1867.

“To Julia Davis and G. F. Smith, by deed dated September 30, 1867, and admitted to record October 4, 1867.

“To John F. McCusick, by deed dated November 20, 1866, and admitted to record April 18, 1868.

“To S. B. Hull, by deed dated August 2, 1872, and admitted to record September 21, 1872.

“To E. D. J. Bond, by deed dated July 1, 1872, and admitted to record June 3, 1873.

“To A. G. Somerville, by deed dated August 1, 1873, and admitted to record August 1, 1873.

“To George W. Tally, by deed dated August 7, 1873, and admitted to record August 7, 1873.

“To David Shearer, by deed dated February 9, 1874, and admitted to record June 18, 1874.

“To John F. Bowen, by deed dated March 13, 1874, and admitted to record ———.

“To J. W. Hull, by deed dated September 1, 1874; and recorded November 6, 1874.

“To J. W. Kight, by deed dated April 1, 1875, and admitted to record August 12, 1875.

“To Thomas H. Dorsey, by deed dated July 1, 1872, and admitted to record December 29, 1875.

“To T. C. Hull and G. S. Hull, by deed dated June 15, 1876, and admitted to record June 17, 1876.

“All of said several lots so conveyed by the said defendant as aforesaid, are particularly described by the said commissioner’s report. And it further appearing to the court that the complainant’s two judgments were docketed upon the judgment-lien docket of said county of Wood, on the 8th day of January, 1869, and that the lien of said judgments had attached to the real estate of the said defendant above mentioned prior to the conveyance herein set forth, except the conveyances to Wm. B. Caswell, Julian Davis and G. F.

Smith and John F. McCusick, whose deeds appear to have been recorded prior to the docketing of said judgments, the court is of opinion that the complainant's two judgments constitute the first lien upon said real estate; that the deed of trust in favor of the Parkersburg Mill Company constitutes a lien second in order of priority on the parcel of real estate therein mentioned, to-wit: One half of the lot conveyed to the defendant by D. E. Hutchinson and wife; and that the decree of Wm. B. Caswell and S. M. Peterson against the defendant and E. H. Hensley constitutes a lien subject to the two above mentioned liens upon the real estate of the defendant hereinbefore set forth, except the following parcels thereof which appear to have been conveyed by deeds duly admitted to record prior to the docketing of said decree in the judgment-lien docket of said county, to-wit, the parcels conveyed to Wm. B. Caswell, Julian Davis and G. F. Smith, John F. McCusick, S. B. Hull, E. D. J. Bond, A. V. Summerville, Geo. W. Tally, David Shearer, John F. Bowen, J. W. Hull, J. W. Kight and Thomas H. Dorsey, all of which parcels are fully described in said report.

"It is therefore, adjudged, ordered and decreed that the said defendant do pay to the complainant the sum of two thousand five hundred and forty-two dollars and forty cents with interest thereon from the 3d day of February, 1865, until paid, subject to a credit of one thousand five hundred dollars as of the 29th of March, 1865, and eight dollars and sixty-nine cents costs at law, being the judgment (Exhibit 'A') as set out in complainant's bill, and the further sum of eight hundred and eighty-seven dollars and fifty cents, with interest thereon from the 17th day of June, 1864, subject to a credit of two hundred dollars paid January 7, 1865, and of five hundred dollars paid July 7, 1866, and eight dollars and seventy-nine cents, costs at law, being judgment (Exhibit 'B') as set out in complainant's bill, together with the costs of this suit, and that the said defendant do pay to the Parkersburg Mill Company the sum of five hundred dollars, with interest thereon from the 12th day of December, 1874, subject to a credit of two hundred and ninety-three dollars and ninety-six cents as of July 1, 1875, and the further credit of four dollars and twenty-five cents as of

the 31st of October, 1877; and that said defendant do pay to W. B. Caswell and S. M. Peterson the sum of one thousand two hundred and seventy-one dollars, with interest on six hundred and thirty-five dollars and fifty cents, part thereof, from April 15, 1866, and upon six hundred and thirty-five dollars and fifty cents, residue thereof, from July 15, 1866, subject to a credit of eight hundred and thirty-two dollars and thirty-five cents as of April 1, 1867, and fifteen dollars and ninety-eight cents, costs of the decree. And it is further adjudged, ordered and decreed that unless the said defendant, or some one for him, do within thirty days from this date pay the said several sums of money, with interest and costs as aforesaid, and the costs of this suit, then Jacob B. Jackson, who is hereby appointed a special commissioner for the purpose, is hereby authorized and required to rent at public auction, at the front door of the court house of this county, on some court day, the above mentioned real estate upon which the complainant's judgments are declared by this decree to be a lien, for the term of five years, provided the same will rent for sufficient to pay and satisfy the sums hereinbefore decreed to be paid by the said defendant, but if the said real estate will not rent for sufficient in said time to pay said sums, then said commissioner is authorized to sell said real estate, or so much thereof as may be necessary, at public auction, before the front door of the court house of this county, on some court day. In case the said property be rented, the commissioner shall take from the lessee bonds, with good security, for the payment of the rent semi-annually, in equal installments, and in case of a sale of said property, the said commissioner shall require one fourth of the purchase-money to be paid in cash, and the residue in three equal installments, on a credit of six, twelve and eighteen months from the day of sale, taking from the purchaser bonds, with good security, bearing interest from date, for the deferred installments, and retaining a lien on the property as further security. Before renting or making sale of said real estate, said commissioner is required to advertise the time, terms and place thereof by publishing a notice in some newspaper printed in the city of Parkersburg for four successive weeks prior thereto, and by posting a copy of such

notice at the front door of the court house of this county for a like time, and said commissioner will report his proceedings under this decree to this Court. Before receiving any money under this decree, said commissioner is required to execute a bond, with good security, in the penalty of three thousand dollars, conditioned according to law, and file the same in the papers of this cause."

From this decree R. M. F. Hull, the defendant, on the 10th day of December, 1881, obtained an appeal and *superse-deas* to this Court.

W. L. Cole and *W. W. Miller* for appellant cited the following authorities: 1 Dan. Chy. Pr. 559 § 9 note 9; 24 Wend. 586; 13 Gratt. 329; Code ch. 139 § 12; 28 Gratt. 428; Freem. Judgts. § 340; 15 N. Y. 508; 34 N. Y. 182; 7 Paige 195; 4 Wend. 587; 7 Johns. Chy. 90; 3 Wait Act. & Def. p. 197 § 3; 3 Ohio 517; 33 Gratt. 620; 7 W. Va. 74; 16 W. Va. 625; Ang. Lim. §§ 311-315 and authorities cited.

Walter S. Sands for appellees cited the following authorities: 28 Gratt. 423; Code Va. (1849) p. 709 § 6; 30 Gratt. 515; 8 W. Va. 210; 6 Gratt. 119; 30 Gratt. 531; 2 Gratt. 44; 9 Gratt. 131; 15 Gratt. 400.

SNYDER, JUDGE, announced the opinion of the Court:

1. The first error assigned is, that the circuit court improperly overruled the demurrer to the plaintiff's bill, for the reason "that the said bill seeks to have the defendant's real estate sold to pay the plaintiff's judgments, and does not allege that they are the only liens upon said real estate, and because it appears that there are other persons whose rights and interests are involved who are not parties to the bill." And that it was also error to overrule the demurrer to the petition of W. B. Caswell and S. M. Peterson, because "said petition shows upon its face that the decree set up therein was barred by the statute of limitations."

The objection of lapse of time was formerly considered a proper ground for a plea and not for a demurrer; for, it was alleged, the plaintiff should have the advantage of showing by replication exceptions which might take the case out of

the operation of the statutory bar. This however, since the abolition and disuse of special replications in equity practice, cannot be considered a sufficient reason for the distinction between a plea and a demurrer, as the plaintiff, if he has any reason or exception to allege to take his case out of the bar arising from the length of time, should show it by his bill; and it is now clearly the rule in equity, that the statute of limitations, or objections in analogy to it, upon the ground of laches, may be taken advantage of by demurrer as well as by plea. 1 Dan. Chy. Pr. 559 sec. 9; *Humbert v. Trinity Church*, 24 Wend. 587; *Dupont v. Mussy*, 4 Wash. C. C. 128; Story's Eq. Pl. § 878; Mitf. Pl. 321, 322.

But in order to take advantage of the statute of limitations by demurrer to a bill or petition in equity, the rule is the same as it is in respect to other defects and insufficiencies, that the allegations of the bill or petition must show affirmatively or by necessary implication without reference to outside facts, that the claim of the plaintiff is barred or that he is not entitled to relief, though the facts alleged are admitted to be true.

Applying this rule of law to the bill and petition before us, the demurrer to neither can be sustained; because the facts alleged in either are sufficient to entitle the parties to the relief prayed for and these facts are not counteracted by other facts alleged therein which operate to defeat such relief. I am, therefore, of opinion that said bill and petition are sufficient and the demurrer was properly overruled.

2. As the second and third assignments of error relate to the decree set up in petition filed by W. B. Caswell and S. M. Peterson, they may be considered together. It is first insisted that the right to enforce the payment of said decree was barred by the statute of limitations at the time said petition was filed in this suit; and second that said decree was procured by fraud and misrepresentation, and that, consequently the court should have sustained the appellant's first exception to the report of commissioner Powell.

In support of the said first ground, it is claimed that, as the said decree in favor of Caswell and Peterson was rendered, on the 20th day of April, 1867, and no execution or other process was ever sued out thereon, and no suit or action

was brought thereon until the 28th day of May, 1877, when process was issued on their said petition, more than ten years having intervened, the said decree was barred by the statute of limitations.

This Court in the case of *Wardenbaugh v. Reid*, 20 W. Va. 588, decided that "the lien of a judgment on which no execution has ever issued, will not be enforced in a court of equity in a suit brought after the lapse of ten years from the date of such judgment." If, therefore, the facts in this suit are, as supposed by the appellant, the said decree of Caswell and Peterson is barred by time. But in my view of this case the action taken by said Caswell and Peterson on the 24th day of March, 1877, arrested the running of the statute of limitations at that time which was less than ten years from the date of their said decree.

It appears from the record that on the said 24th day of March, 1877, the said Caswell and Peterson presented to the circuit court their petition praying to be admitted as parties plaintiffs in this suit, and thereupon the court ordered that they be admitted as parties plaintiffs, that their petition be filed; and that said petition be remanded to rules and process be issued thereon against the defendant, Hull, to answer the same. It further appears that at rules held in the clerk's office of said court on the 28th day of May, 1877, process was issued on said petition, returnable to the next June rules, and, as shown by the decree of September 27, 1877, said process was duly served on the defendant.

In a court of chancery, it was formerly necessary for the plaintiff to file his bill before the issuing and service of process. But now in this State, except in injunction suits, it is the practice to issue and have the process to answer served before the filing of the bill, and when the bill is filed the *lis pendens* relates back to the service of the process. *Harmon v. Byram*, 11 W. Va. 511; 2 Bart. Chy. Pr. 1035.

Where a bill is filed by one creditor as plaintiff, on behalf of himself and others, the statute of limitations will cease running against any of the creditors, who come in under the decree, from the time such suit was commenced. Ang. on Lim. § 331. But if the suit be commenced by one lien-creditor, who does not sue on behalf of himself and other credi-

tors, and an order of reference is made in such suit convening by publication all the lien-creditors of the same judgment debtor; in such case the statute will cease running against creditors, who may come into such suit, only from the date of the order of reference. *Ewing v. Ferguson*, 33 Gratt. 548.

It is the constant practice in this State, where a suit is pending to enforce judgment-liens against a debtor's lands, to permit other lien-creditors of such debtor to file petitions in such suit making themselves parties thereto. *Marling v. Robrecht*, 13 W. Va. 440. Such petition can only be filed by leave of the court, and an opportunity must be given to any party in interest to answer it. But where no new parties are brought into the suit by the petition, and especially where the cause is subsequently referred to a commissioner, so that all the parties interested can be heard and make their objections, it is not the practice to serve process to answer the petition. *Kendrick v. Whitney*, 28 Gratt. 646; *Marling v. Robrecht*, 13 W. Va. 410.

Where creditors at large file a bill to set aside a deed of their debtor conveying land as fraudulent, and other creditors of such debtor come into said suit by successive petitions, upon a decree setting aside such deed, the said petitioners will be decreed to have liens on such land from the respective dates of the filing of their petitions in the suit. *Wallace v. Treagle*, 27 Gratt. 479. And it seems, that the same rule applies where parties by petition come into a suit brought to subject the separate estate of a married woman to the payment of her debts; in such case the petitioners will also have priority for the satisfaction of their debts out of such estate from the dates of their respective petitions. *Hughes v. Hamilton*, 19 W. Va. 366.

The principle in all proceedings in chancery, seems to be, that the first action taken by a party for the assertion of his claim by legal process, whether that be by the issuing of process for the commencement of a suit or the filing of a petition in a suit already commenced, is treated as the institution of his suit, and from that time the statute of limitations ceases to run against him. *Ewing v. Ferguson*, 33 Gratt. 548; *Kent v. Cloyd*, 30 Id. 555. It necessarily follows, therefore, that the right of the petitioners, Caswell and Peterson,

to enforce the lien of their decree was not barred by the statute of limitations at the time of filing their petition in this suit.

In reference to the second ground alleged against the said decree of Caswell and Peterson, I do not deem it proper to do more than to decide, that, if the appellant by the proof already taken or such further evidence as he may hereafter adduce, establishes the averments of his answer to the petition of said Caswell and Peterson filed in this cause, then the circuit court should set aside said decree as fraudulent. And as to the sufficiency or insufficiency of the proof now in the record to sustain said allegations, I express no opinion, as the cause must be remanded to the circuit court for errors hereinafter stated, where the matter can be more satisfactorily considered.

3. The fourth and last assignment is, that the "circuit court erred in decreeing the sale of the real estate in said decree mentioned, or the leasing thereof, without first having all the parties in interest before the court so that their rights in the premises could be settled and determined by a decree that would be binding upon them."

In *Neely v. Jones*, 16 W. Va. 626, this Court decided, that: "A creditor, who brings suit against a debtor to enforce against his lands a judgment-lien, should sue on behalf of himself and all other judgment-creditors excepting those made defendants, and he should make formally defendants in the suit all creditors who have obtained judgments in the courts of record in the county or counties in which the debtor owns lands sought to be subjected to the payment of the judgments, also all creditors who have obtained judgments in courts of record or before justices in any part of the State, and have had them docketed on the judgment-lien docket of said county or counties. If in such bill the creditor should fail to sue on behalf of himself and all other judgment-creditors, but the court should afford to all judgment-creditors an opportunity to have their judgments audited before a commissioner, by directing a publication to be made, calling on them to present their judgments for auditing, the Appellate Court will regard this as a creditor's bill, the same as if the plaintiff in his bill had sued on behalf of himself and all

other judgment-creditors except those made defendants. If all the judgment-creditors are not made parties to such a suit, either formally or informally, and this is disclosed in any manner by the record, the Appellate Court will reverse any decree ordering the sale of the lands or the distribution of the proceeds of such sale."

In *Norris, Caldwell & Co. v. Bean*, 17 W. Va. 655, this Court declared that the necessary parties defendant to such bill are:

"I—The judgment-debtor himself ;

"II—The trustees in all deeds of trust on the judgment-debtor's land sought to be subjected to the payment of judgment-liens ;

"III—If the deeds of trust are deeds to secure the payment of a limited number of debts, then the *cestuis que trust* in these deeds, including not only the parties to whom the debts secured are due, but also all the obligors in these debts, if there be any other obligor than the grantor or judgment-debtor, and if the trusts are of different character then all the *cestuis que trust* in them, unless from their indefinite description or some other good reason they would not all be made defendants in any suit in equity brought by an adverse claimant against the trustee respecting the trust-property ;

"IV—All the several plaintiffs as well as all the several defendants in all judgments in the courts of record in the counties in which the lands sought to be subjected lie, which have been rendered against the judgment-debtor alone or the judgment-debtor and other defendants jointly, and also all the plaintiffs and all the defendants in any such judgments, whether rendered by courts of record or by justices in any part of the State, which have been docketed on the judgment-lien docket of said county or counties ; and

"V—Any other party, who according to the general rules of equity in the particular case has such a direct interest in the subject-matter or object of the suit, as would render it necessary that he should be made a defendant to the suit, as for instance the transferee or other owner of any debt secured by a deed of trust on any part of the real estate sought to be subjected to the payment of the judgment-debts." *Shenandoah V. N. Bank v. Bates*, 20 W. Va. 210.

Our statute now provides who shall be made parties to a suit by a lien-creditor and how notice shall be given to other lien-holders—section 7, chapter 126 of Acts 1882. And section 8 of said act provides that: “Where the real estate liable to the lien of a judgment is more than sufficient to satisfy the same, and it, or any part of it, has been aliened, as between the alienees for value, that which was aliened last shall, in equity, be first liable, and so on with other successive alienations until the whole judgment is satisfied.” Section 9, chapter 139 of Code, p. 666; *Renick v. Ludington*, 20 W. Va. 511.

Applying these principles of equity to the decree appealed from in this cause, the errors are apparent and need but little discussion. The only original parties to the suit were the plaintiff, H. J. Jackson's administrator and the defendant, R. M. F. Hull, and no one was subsequently made a party except W. B. Caswell and S. M. Peterson, who were made such on their own petition. These are the only parties to the suit, made so either formally or informally; for this was not a bill filed by the plaintiff on behalf of herself and all other judgment-creditors, nor was it made a creditors' bill by reference to a commissioner and a convention of the creditors by publication in a newspaper. The judgment-debtor at the date of the decree owned no real estate, he having by successive alienations prior thereto disposed of all his real estate. None of his alienees are parties to the suit, yet the decree orders their real estate to be sold or rented. And the order of renting or sale is not to subject said real estate to the payment of the liens thereon in the inverse order of the alienations as required by the statute, but they are subjected without distinction. The judgments of Braiden, Ruth & Co., A. B. Clark & Bro., M. P. Amiss, J. H. Haun & Co. and Jenkins, Jackson & Co. and the trust-debt of H. W. Buckley are considered and rejected without either of said creditors having been made parties or having an opportunity to be heard; and a debt is allowed in favor of the Parkersburg Mill Company, without its having been in any manner made a party.

For these errors and, perhaps of others, which, if they exist, it is unnecessary to refer to, the said decree of the circuit

court of April 8, 1880, must be reversed with costs to the appellant against the appellees. And this cause is remanded to the said circuit court of Wood county with leave to the plaintiff to amend his bill by making parties thereto all those whom it is necessary to make such according to the rules and principles set forth in this opinion; that the appellant, Hull, and the petitioners, W. B. Caswell and S. M. Peterson, have leave to take any further proof they, or either of them, may desire in support of the allegations in the petition of said Caswell and Peterson filed in this suit or the answer of said Hull to said petition; and that this cause be further proceeded in in said circuit court according to the principle announced in this opinion and further according to the rules and practice in courts of equity.

THE OTHER JUDGES CONCURRED.

DECREE REVERSED. CAUSE REMANDED.

WHEELING.

LANE v. BLACK.

Submitted August 4, 1882—Decided April 28, 1883.

(*WOODS, JUDGE, Absent.')

1. Demurrer to a declaration, on the ground that it does not directly charge, that the plaintiff suffered damage, when such charge is made substantially and not by inference, is properly overruled. (p. 621.)
2. Where an agent buys a claim for his principal, and in order to induce the seller to part with it makes false and fraudulent misrepresentations in reference thereto, and the principal accepts the purchase and takes the benefit thereof, he cannot while claiming the benefit of the purchase and retaining the claim repudiate said representations of his agent, on the ground that they were not authorized by him and were not within the scope of his authority. (p. 626.)

*Case submitted before Judge W. took his seat on the bench.

21	617
34	237
21	617
35	15
36	7
21	617
d62	622
21	617
64	145

3. Where an attorney or agent undertakes the collection of a claim for his client or principal and, while such relation exists, buys the claim from his principal, whether false representations were made or not to induce the principal to sell his claim, or even if the claim was sold for an adequate price, the sale is voidable at the option of the principal. (p. 623.)

Writ of error and *supersedeas* to a judgment of the circuit court of the county of Jefferson, rendered on the 17th day of June, 1881, in an action at law in said court then pending, wherein John G. Lane was plaintiff, and G. W. Z. Black was defendant, allowed upon the petition of said Black.

Hon. C. J. Faulkner, jr., judge of the thirteenth judicial circuit, rendered the judgment complained of.

The facts of the case fully appear in the opinion of the Court.

Daniel B. Lucas for plaintiff in error cited the following authorities: 2 Rob. Pr. 620, 621, 628; 18 E. L. & Eq. 522; 1 Chit. Plead. 320; Rev. St. U. S. § 3477; 6 E. L. & Eq. 562; 15 W. Va. 867; 9 Gratt. 485; 11 Gratt. 697; Sedg. Dam. (2d. Ed.) 705, 706.

White & Trapnell for defendant in error cited the following authorities: Story Ag. §§ 134, 135, 137 n. 3, 140; 2 Add. Torts § 1197; *Id.* § 1209; 7 Gratt. 368; 12 Wall. 470; 2 Pet. 364; Story Ag. §§ 244, 250; 2 Gratt. 237; Pal. Ag. 324, 325; 2 Add. Torts § 1310; Story Ag. § 200; 2 Kent's Com. 653; 1 Add. Torts § 570; 2 Add. Torts § 1184; 1 Sm. Lead. Cas. 321 (Am. Note); 18 Pick. 95; 32 Gratt. 293; 2 Add. Torts 1175, 1208; 2 Kent's Com. 653; Sedg. Dam. s. p. 556; 32 Gratt. 293; Sedg. Dam. s. p. 557; 2 Add. Torts § 1226; 5 Mason 1; 2 Rob. Pr. 618; 1 Chit. Plead. 375, 376, 377; *Id.* 384; 2 Rob. Pr. 618, 619; Sedg. Dam. s. p. 574.

Baylor & Wilson for defendant in error cited the following authorities: 2 Gratt. 237; 7 Gratt. 368; 2 Greenl. Ev. § 66; 6 M. & G. 242; 6 Otto 640; Story Agen. §§ 139, 451; 13 N. H. 145; 11 W. Va. 108; 17 Gratt. 303; 14 Gratt. 338; Chit. Contr. 227 and note; 8 Carr. & P. 316; 1 Hill 317; 5 Hill 187; 14 Mich. 208.

JOHNSON, PRESIDENT, announced the opinion of the Court:

This is an action on the case brought by John G. Lane, in February, 1878, in the circuit court of Jefferson county against G. W. Z. Black, laying his damages at one thousand dollars. The first count in the declaration, after stating the formal part, is as follows: "For that, whereas, before and at the time of committing the grievances by the defendant as hereinafter next mentioned, the plaintiff was the holder and owner of a claim or demand against the United States for a large amount, to-wit, twenty-seven thousand one hundred pounds of beef theretofore sold and delivered by the plaintiff to the said United States; that the said defendant before and at the time of the committing of the said grievances was doing business as an agent and attorney for the collection of claims against the said government, and as such agent or attorney said defendant had theretofore, to-wit, on the — day of ——— 187— undertaken in consideration of certain fees, commissions and reward, the prosecution and collection of plaintiff's said claim; and the said defendant, to-wit, on the — day of December, 1874, wrongfully and injuriously contriving and intending to deceive, defraud, and injure the plaintiff in this behalf, and to induce the plaintiff to sell the defendant his said claim or demand for greatly less than its value, falsely and deceitfully, pretended to said plaintiff, that said claim or demand was of much less value than it really was, to-wit, that the sum of three hundred and thirty dollars was a very good price therefor, and 'as much or nearly so as plaintiff would realize if the claim was settled and paid.' And then and there by means of false pretenses and misrepresentations as aforesaid, prevailed upon the plaintiff to sell and assign his said claim or demand to the said defendant for the sum of four hundred dollars; when in truth and in fact, before and at the time of the making of said false and fraudulent misrepresentations, said claim or demand as the defendant well knew had been fully proven, passed upon and allowed as good by the proper authorities of the said United States for a large amount, to-wit, for the sum of one thousand two hundred and thirty-four dollars and forty cents."

The second count sets out more fully the fiduciary relation existing with reference to the said claim, and the advantages

taken thereof by false and fraudulent representations to induce plaintiff to sell and assign said claim to defendant. The third count omits the fiduciary relation, but charges the false and fraudulent misrepresentations to induce the plaintiff to sell and assign his claim to defendant at much less than its value.

At the April term 1879, the defendant demurred to the declaration and each count thereof, which demurrer was overruled, and the defendant pleaded not guilty. The case was tried by a jury, and on the 2d of June, 1881, the jury rendered a verdict for the plaintiff, and assessed his damages at seven hundred and nine dollars and thirty-three cents. The defendant moved for a new trial, which motion the court overruled and entered judgment upon the verdict. The defendant during the trial took four several bills of exceptions to the ruling of the court in giving, refusing and modifying instructions. To the judgment the defendant obtained a writ of error.

The first error assigned is, the overruling of the demurrer to the declaration. It is urged, that each count of the declaration is fatally defective because it is claimed that the declaration does directly allege, that the price of four hundred dollars, for which the plaintiff sold his claim was an adequate price, and therefore there is no charge, that damage was sustained. As to the first two counts this was unnecessary as the plaintiff had a perfect right, in view of the fiduciary relation, that existed between plaintiff and defendant, to repudiate the sale without reference to the question of the adequacy of the price received. *Newcomb v. Brooks*, 16 W. Va. 32. But it seems to us, that it is clearly charged in all the counts, that he suffered damage. In the first count, and the others are similar, it is charged, that in order "to induce the plaintiff to sell the defendant his claim or demand at greatly less than its value defendant falsely represented said claim as of very much less value than it really was. * * And then and there by means of such false pretenses and misrepresentations as aforesaid, prevailed upon the plaintiff to sell and assign his claim or demand to the said defendant for the sum of four hundred dollars, when in truth and in fact, before and at the time of the making of said false pre-

tenses and fraudulent misrepresentations, said claim or demand as the plaintiff well knew had been fully proven, passed upon and allowed as good by the proper authorities of said United States for a large amount, to-wit, for the sum of one thousand two hundred and thirty-four dollars and forty cents," and alleges that his damages are one thousand dollars. The demurrer to the declaration was properly overruled.

The third bill of exceptions first sets out the receipt of the plaintiff for the beef sold to the United States, signed by an officer thereof and dated the 5th day of August, 1862, which voucher closes as follows: "And the same will be paid for after the close of the present war upon proof, that the said John G. Lane is and has remained a loyal citizen of the United States during the war." Then follows certificates from the treasury department of the United States as to said claim, among which is this: "Treasury Department, Third Auditor's Office, December 1, 1874. I certify there is due from the United States to John G. Lane for fourteen thousand nine hundred and five pounds net of beef at nine and eleven-one-hundredths cents per pound, August 5, 1862, one thousand two hundred and ninety-four dollars and forty-two cents," which first receipt the bill of exceptions certifies is the same receipt or voucher called the plaintiff's claim in the instruction, to which the exception is taken, and the evidence tended to support the hypothesis of the said instruction, whereupon the court at the instance of the plaintiff instructed the jury, that "if the plaintiff was induced to sell his claim against the United States government to the defendant by positive false representations of a material fact or facts, by the defendant or his agent, or the concealment of material facts, which it was the duty of the defendant or his agent to communicate to him, then neither the question of the plaintiff's loyalty to the United States government nor his ownership of the cattle, for which the receipt or voucher was given can be considered by the jury in determining the issue in this case." To the giving of which instruction the defendant excepted. The instruction is clearly right. If the claim had been actually allowed to the plaintiff, John G. Lane, by the government of the United States then under the issue in this

case it could not be material, whether Lane really owned the cattle he sold to the government, or whether he was or was not loyal to the government of the United States during the war.

From the fourth bill of exceptions it appears, that there was evidence tending to show, that the defendant was the attorney for the plaintiff as set out in the declaration, and that on the 3d day of December, 1874, he purchased the plaintiff's claim as set out in the declaration for four hundred dollars without recourse, and that on the 23d day of March, 1875, the defendant received on said claim the sum of one thousand three hundred and thirty-four dollars and forty cents. The evidence further tended to show, that had the plaintiff not parted with his claim he would have received the said sum of one thousand three hundred and thirty-four dollars and forty cents less twenty-five per cent. for collection, and the evidence also tended to show, that the said sum of four hundred dollars was at the time of said purchase, the fair salable or marketable value of said claim; but that plaintiff would not have sold it to defendant but for the false inducements held out to plaintiff by defendant or his agent, as hypothetically stated in the instruction of the court, to which this exception is taken. Thereupon the defendant asked the court to instruct the jury as follows: "The court instructs the jury, that should they find from the evidence that the defendant or his agent fraudulently made false representations to the plaintiff, whereby the latter on the 3d day of December, 1874, was induced to part with his claim at less than its value, then the measure of the plaintiff's damages is the difference between the actual price he received for said claim and its real value at that time, less the *per centum* stipulated to be paid the defendant for collecting with interest from said date. But should they find, that the price actually received by the plaintiff was not less than the true value of the claim at that date, as shown by the evidence, then they will find for the defendant." The court declined to give the instruction as asked, and in lieu thereof instructed the jury: "If they find from the evidence, that the defendant or his agent fraudulently made false representations to the plaintiff, whereby the latter on the 3d day of December, 1874, was

induced to part with his claim at less than its value, then the measure of the plaintiff's damages is the difference between the actual price he received for said claim and its real value at that time, less the *per centum* stipulated to be paid for collecting with interest from said date; and that if the jury believe from the evidence, that the price actually received by the plaintiff for his claim sold to the defendant on the 3d day of December, 1874, was not less than the salable or marketable value of said claim at that date, they must find for the defendant, unless the jury believe from the evidence, that the plaintiff was induced to sell his claim to the defendant by positive false representations of material facts made by the defendant or his agent, or by concealment of material facts, which it was the duty of the defendant or his agent to communicate to the plaintiff, and further find, that the plaintiff would have received a larger sum on said claim when collected had he not been induced by false representations and concealments to dispose of said claim, in which event they must find for the plaintiff." To the refusal to give the instruction as asked, and to the giving of those given in lieu thereof the defendant excepted.

This Court held in *Newcomb v. Brooks*, 16 W. Va. 32, that a person who occupies any fiduciary relation to another is bound not to exercise for his own benefit and to the prejudice of the party to whom he stands in such relation, any of the powers or rights or any knowledge or advantage of any description, which he derives from such confidential relation. And further, that a purchase by a fiduciary while actually holding such relation in reference to the trust-property, either of himself or of the party to whom he holds such fiduciary relation, is voidable at the option of the party to whom he stands in such relation, although the fiduciary may have given an adequate price for the property and gained no advantage whatever.

As the bill of exceptions shows, that there was evidence tending to prove the facts set out in the first and second counts of the declaration, that the defendant was the agent and attorney of the plaintiff for the collection of his claim against the United States, and that while standing in such relation after the claim had been allowed by the authori-

ties of the United States for over one thousand three hundred dollars, he bought the claim of his principal or client for the sum of four hundred dollars, and a short time thereafter actually received on the claim the sum allowed by the proper authority, amounting to one thousand three hundred and thirty-four dollars and forty cents. The plaintiff chose to repudiate the sale, which he had a perfect legal right to do, and the court under the circumstances should have instructed the jury, that the measure of the plaintiff's damages was the difference between four hundred dollars, the price received by the plaintiff for the claim, and one thousand three hundred and thirty-four dollars and forty cents the price received by the defendant therefor, with interest from the date he received it less the price stipulated to be paid for collecting the same. The instructions referred to and made part of the bill of exceptions are all improper, but not prejudicial to the defendant; they were much more favorable to him, than they should have been. Under the facts disclosed in the bill of exceptions, it was entirely immaterial what representations were made by the defendant or his agent to the plaintiff to induce him to part with his claim. The fiduciary relation of attorney to client or agent to principal existed at the time the sale was made, and the sale was voidable at the option of the plaintiff.

The second bill of exceptions is to the giving of the following instruction: "If the jury believe from the evidence, that if the defendant in treating for the purchase of the claim, or his agent at the time of the purchase thereof, made a positive false representation as to any material part constituting an inducement to the sale, or by the concealment of any such fact, in which plaintiff was misled and suffered damage, and in which plaintiff is presumed to have trusted to them or to either of them, and not to have relied on his own judgment, then the purchase of said claim was fraudulently obtained, and the jury must find for the plaintiff."

None of the facts tending to prove what was the relation of the parties to each other are set out in the bill of exceptions, and it is impossible for the Court to say whether the instruction was relevant or not, but as a proposition of law the instruction seems to us to be correct.

Crump v. U. S. Mining Co., 7 Gratt. 368; *Grim v. Byrd*, '32 Gratt. 293.

Bill of exceptions No. 1 sets out none of the evidence tending to prove a state of facts showing the relevancy of the instruction, although the court in general terms certifies as in bill of exceptions No. 2, that such evidence was given, and the defendant asked the court to give the two following instructions: 4. "The court instructs the jury, that if they find that the only misrepresentations made, if any were made by Samuel Black, and if they further believe, that such misrepresentations were innocently made without any fraudulent intent, and were not authorized by the defendant, who had no knowledge that they were made, or charged to be made before the institution of this suit, then they will find for the defendant, unless they further find, that when said representations were made by Samuel Black he was the agent of the defendant, and was acting within the scope of his employment or authority." 5. "The jury must find, that the agent of the defendant acted within the range of his employment before the principal can be bound by any false representations of such agent." The court refused the instructions, and in lieu thereof gave the following: "The court instructs the jury, that if they believe from the evidence, that Samuel Black was the agent of the defendant in the purchase of the claim of the plaintiff, without he made positive false representations of material facts or concealed facts, which it was his duty to communicate to the plaintiff, and that such representations or concealments of such facts were made or withheld by the agent at the time of the purchase of said claim, or if they believe from the evidence, that the agent in making such representations or concealments acted beyond the scope of his authority, yet if they further believe from the evidence, that the defendant ratified the purchase of the plaintiff's claim made by the said agent by accepting and receiving the benefit of such purchase, then in either case all representations and acts of the said agent occurring at the time of the purchase and with reference thereto are binding on the principal." To which refusal and to the giving of these instructions in lieu thereof, the defendant excepted.

There is nothing in this bill of exceptions to show, that

the modification of the instruction was wrong. We cannot look to any of the other bills of exceptions to aid us in this, neither the evidence nor the facts being certified. If it was a fact, and we must assume that it was, that the evidence tended to show, that the plaintiff accepted the fruits of the purchase by Samuel Black, his agent, then the representations which such agent made are also binding upon him.

It has been held, that a debtor cannot have the benefit of a compromise and release effected by his agent with his creditors, without adopting all the representations made by the agent to the creditors in negotiating the same. *Crans v. Hunter*, 28 N. Y. 389; *Southern Express Co. v. Palmer*, 48 Ga. 85; *Menkens v. Watson*, 27 Mo. 163; *Krider v. Trustees Western College*, 31 Ia. 547. And further, that the principal cannot ratify the act of the agent in part and repudiate it in part; he must repudiate the whole or he will be bound by the acts of the agent in his behalf. *Fort v. Coker*, 11 Heisk. 579. We find no error in the record of the judgment to the prejudice of the defendant, and it must be affirmed with costs and damages according to law.

JUDGES GREEN AND SNYDER CONCURRED.

JUDGMENT AFFIRMED.

WHEELING.

FISHER v. BURDETT.

Submitted January 11, 1883—Decided April 28, 1883.

Under the provisions of section 5 of chapter 126 of the Code of this State, in any action on a contract, whether the *contract be by deed* or by parol, the defendant may file a plea alleging any such failure in the consideration of such contract, or fraud in its procurement, as would entitle him either to recover damages at law from the plaintiff, or to relief in equity, in whole or in part; and if such plea is sufficient in form he is entitled to prove facts showing such failure in the consideration in whole or in part. (p. 629.)

Writ of error to a judgment of the circuit court of the county of Roane, rendered on the 17th day of March, 1880, in an action of debt in said court then pending, wherein Henry J. Fisher was plaintiff, and James E. Burdett was defendant, allowed upon the petition of said Fisher.

Hon. Joseph Smith, judge of the seventh judicial circuit, rendered the judgment complained of.

The facts of the case are stated in the opinion of the Court.

C. Hogg for plaintiff in error.

J. G. Schilling for defendant in error cited Code ch. 126 § 5; 13 Gratt. 747 and 7 Gratt. 310.

SNYDER, JUDGE, announced the opinion of the Court :

This was an action of debt, on four several obligations under seal, brought by the plaintiff against the defendant in the circuit court of Roane county. The consideration of said obligations, as shown by recitals therein, was certain professional services which the plaintiff agreed to render the defendant as an attorney at law. A part of the plaintiff's demand was not contested and the court on March 2, 1875, gave the plaintiff judgment for such uncontested part and costs, and as to the residue the defendant pleaded payment and issue was thereon joined. At a subsequent term the defendant filed a special plea in writing to which the plaintiff replied generally and issue was also joined thereon. Three trials were had by jury and in each a verdict found for the defendant. The first two verdicts were set aside by the court and judgment entered for the defendant on the third. Before the last trial the defendant by leave of the court withdrew his replication to the defendant's special plea and moved the court to strike said plea from the record, which motion the court overruled, and then plaintiff again filed his replication to said plea and issue was joined thereon. During the final trial the plaintiff took a bill of exceptions, from which it appears that certain facts were proved by the defendant tending to show a failure in the consideration of the obligations sued on, to the proving of which facts the plain-

tiff objected, but the court overruled said objection and the plaintiff excepted. The said special plea of the defendant is based upon the first clause of section 5 of chapter 126 of our Code, and alleges facts which, if proved, establish a total failure in the consideration of the obligations in the plaintiff's declaration mentioned, but it does not aver any such matter existing before the execution of said obligations, or any such mistake therein or in the execution thereof, as would have entitled the defendant to relief in equity in whole or in part. There was no objection to the form of the plea in the court below, and, as I see none, it is unnecessary to set it out further here. The only ground relied on by the plaintiff in error for reversing the judgment of the circuit court is, that the obligations sued on by the plaintiff, being contracts under seal, the law conclusively presumes a consideration therefor, and, therefore, the said court erred in permitting the defendant either to plead or prove any failure in the consideration thereof. By implication he admits that the defendant might have pleaded and proved, under the latter clause of said section five of the statute, such matter existing before the execution of said obligations, or any such mistake therein or in the execution thereof, as would entitle him to relief in equity, but he denies that the first clause of said section has any application to contracts under seal. If such is the proper construction and effect of said statute the circuit court erred; otherwise, it did not, and this is the sole question to be determined in this case.

The first statute of Virginia authorizing equitable defenses, or sets-off of this character, was passed April 16, 1831. Acts 1830-31, ch. 11 sec. 62 p. 62. This act in terms declared that: "In all actions at law, founded on contract, *whether such contract be by deed or parol*, * * * the defendant may file a special plea in bar, in the nature of a plea of set-off, alleging any such matter of fraud in the consideration, or in the procurement of the contract, *or any such failure in the consideration thereof*, * * * as would entitle such defendant, either to recover damages at law, in any form of action, from the plaintiff, * * * or to relief in equity, in whole or in part, against the obligation of the contract upon him; * * And in all actions founded on any contract by deed, the de-

fendant may file a special plea in bar, in the nature of a plea of set-off, alleging any such matters existing before the execution of the deed, or any such mistake therein, or in the execution thereof, as would entitle him to relief in equity, in whole or in part, against the obligation of the contract upon him."

This act continued in force until the Code of Virginia of 1849 went into effect. The revisors of that Code in their report, without note or comment, substituted for said act, section 5 of chapter 172 of said Code of 1849, which was adopted by the Legislature, and our statute—section 5 of chapter 126 Code of 1868—is a literal copy from the Code of 1849.

The said section 5 of our Code is as follows:

"5. In any action on a contract, the defendant may file a plea alleging any such failure in the consideration of the contract, or fraud in its procurement, or any such breach of any warranty to him of the title to real property or of the title or the soundness of personal property, for the price or value whereof he entered into the contract, as would entitle him, either to recover damages at law from the plaintiff, or the person under whom the plaintiff claims, or to relief in equity, in whole or in part, against the obligation of the contract; or if the contract be by deed, alleging any such matter existing before its execution, or any such mistake therein, or in the execution thereof, as would entitle him to such relief in equity; and in either case alleging the amount to which he is entitled by reason of the matters contained in the plea. Every such plea shall be verified by affidavit."

Before the adoption of said act of 1831, the courts of Virginia held, that the defendant could not vacate a bond at law because he was imposed upon in a settlement of accounts which preceded its execution, or because the bond was founded on a false or fraudulent statement of facts—*Taylor v. King*, 6 Munf. 368; or because the bond had been obtained by fraudulent misrepresentations made by the plaintiff—*Wyche v. Macklin*, 2 Rand. 426; or when the action was on a contract either by deed or by parol the defendant could not at law show, that the consideration had failed in part—*Tomlinson v. Mason*, 6 Rand. 169; *Webster v. Couch*, *Id.* 519; 1 Rob. Pr. (old) 227-8; *Christian v. Miller*, 3 Leigh 78.

After the passage of said act, it was held, that under its provisions, a tenant may set-off against rents the damages accrued by the failure of his lessor to make repairs—*Caldwell & Co. v. Pennington*, 3 Gratt. 91; or in an action upon a bond given for the hire of two slaves one of whom was never delivered, the hirer is entitled to a credit for the amount of the hire of the slave not delivered—*Isbell v. Norrell*, 4 Id. 176; or in an action on a bond given for a slave the defendant may plead that the slave was unsound at the time of the sale which fact the plaintiff knew but fraudulently concealed—*Fleming v. Toler*, 7 Id. 310; or in debt on a bond, a plea that it was given for goods which were unsound, is good—*Cunningham v. Smith*, 10 Id. 255.

In *Watkins v. Hopkins*, 13 Gratt. 743, decided in 1857, in a suit brought in 1854, after the Code of 1849 went into effect, the court held, that in an "action on a bond given for land, a plea that the plaintiff had failed to give the defendant possession of two acres of the land: or a plea that the plaintiff had failed to deliver possession of the land for two months after the time at which by the contract he was to deliver possession; or that he had not delivered the tenement in the plight and condition in which it was at the time of the sale, and in which by the contract he was to deliver it, but delivered it in a damaged condition from injuries done or permitted in the meantime to the tenement and freehold, is a good plea, setting up a partial failure of the consideration." In delivering the opinion of the court in that case Judge Lee says: "The terms of the act are general, 'in any action on a contract,' and it includes contracts by deed as well as by parol, and there can be no reason for excluding all contracts relating to the sale and purchase of real property from its operation." 13 Gratt. 747.

The plain purpose of the said statute was to give the same measure of relief, by a plea under it, that could be obtained by the defendant in an independent action brought at law for the same cause, or in equity for relief growing out of the same transaction, and thus to prevent one cause of action from being divided into two. So that to give effect to this plain purpose it is as essential that it should include contracts under seal as well as contracts by parol. The original act of 1831

did in express terms include both classes of contracts, and neither the language of the statute of 1849 nor the circumstances attending its substitution for said act, indicate any intention or purpose to restrict the latter statute to contracts by parol. When any change in the law was intended the revisors almost invariably added a note to their report giving the character of the change and their reasons for it, and when no change was intended except in the words or by condensing and making it more brief, they as invariably made no comment. In reporting this statute, they did so, without note or comment, thus indicating very strongly by implication that no alteration in the effect of the statute was made or intended to be made. But if there could have been any doubt on the subject, that doubt has been entirely removed by the decision of the court in *Watkins v. Hopkins*, 13 Gratt. 748, from which we have quoted above. The court there, after quoting a part of the first clause of our present statute states, expressly, that, "it includes contracts *by deed* as well as by parol."

I am, therefore, of opinion upon both reason and authority that, under said section 5 of chapter 126 of our Code, the defendant, in any action on a contract, whether such contract be under seal or by parol, may file a plea alleging any such failure in the consideration of the contract or found in its procurement, as would entitle him either to recover damages at law from the plaintiff, or to relief in equity, in whole or in part; and that consequently the circuit court did not err in this case in refusing to strike out the defendant's special plea, nor in permitting the defendant to prove facts on the trial tending to show a failure in the consideration of the obligations sued on by the plaintiff.

For the foregoing reason the judgment of the circuit court must be affirmed with costs to the defendant in error and thirty dollars damages.

THE OTHER JUDGES CONCURRED.

JUDGMENT AFFIRMED.

WHEELING.

ANDERSON v. SNYDER.

Submitted January 18, 1883—Decided April 28, 1883.

(*SNYDER, JUDGE, Absent.)

1. A court of equity will not decree a cancellation of a contract for the sale of land between vendor and vendee, in the absence of mistake, accident or fraud, where the contract is not illegal or contrary to public policy, merely on the ground of deficiency in the quantity of land sold, where compensation for such deficiency, can be made to such vendee. (p. 642.)
2. Where a vendee has conveyed to the vendor certain lands, in exchange for other lands sold to such vendee and the vendor has conveyed the lands so conveyed to him, to a third party, and he is unable to reconvey said lands to such vendee, it is error in the court to decree a cancellation of said deed, in a suit brought by said vendee against said vendor and his alienees of said land, upon the consent of said vendor, even where his said alienees fail to appear, in the circuit court or in this Court to resist the same. (p. 640.)
3. If it appear to this Court that such decree of cancellation so entered by the consent of such vendor, will be detrimental to the interests of any of the defendants, it will, in accordance with its ninth rule of practice "consider the whole record as before it and will review the proceedings in whole or in part, in the same manner, as it would do, were such appellee to bring the same before it by appeal, unless such error shall be waived by such appellee." (p. 641.)
4. If the vendor by his written contract agrees to convey for a specified price, a tract of land described by metes and bounds or otherwise, with the words added, containing a specified number of acres, or that number of acres "more or less," this on the face of such contract is a contract not by the acre, but in gross and without any implied warranty of the quantity, and not being ambiguous cannot be explained, modified or altered by any kind of parol testimony. And in such a case, if there was no fraud in either party, a court of equity will allow no abatement or compensation on account of a deficiency in the quantity of said land. (p. 647.)
5. Although the sale be in gross, and not by the acre, if the vendor, to induce the vendee to purchase, falsely represents to him that

*Counsel below.

the land contains a specified number of acres, or that number "more or less," and the vendee relying on the truth of such representation, is thereby induced to purchase the same as containing about that number of acres, at a price he would not otherwise have given for it, such representation even if innocently made, may amount to an implied warranty of the number of acres, and the vendor may be compelled to account to the vendee for a deficiency in the number of acres. (p. 648.)

6. If such false representations of such vendor be unqualified, as made upon his personal knowledge, and the vendee believe and rely on them as true, which he has a right to do, it ought *prima facie* to be regarded, that the vendee was induced to pay, or to agree to pay the price named in the contract because of the statement contained in it of the number of acres in the tract of land sold, and the vendor must in the absence of all proof, be regarded as guilty of a fraud upon the vendee, and for this reason a court of equity will require the vendor to make to the vendee an abatement from his purchase-money if not paid, or if paid, compensation for such deficiency. (p. 654.)
7. The measure of such compensation or abatement is the contract price by the acre, of the land sold, if the same can be ascertained, and if not ascertainable, then the average value by the acre of the land sold, must be taken as the measure of such compensation or abatement. (p. 654.)
8. Sections 22 and 23 of chapter 130 of the Code of West Virginia made no material change in the common law rule of evidence as to husband and wife giving evidence, for or against each other, in a cause in which they are parties, except in an action or suit between husband and wife. *Rose & Co. v. Brown*, 10 W. Va. 122 and *Hill et ux. v. Proctor*, 11 W. Va. 59. (p. 644.)
9. In the fifth exception to section 23 of chapter 130 of the Code of West Virginia, the words in "*an action or suit between husband and wife*," are to be construed as synonymous with the words, "*a controversy between husband and wife*," and therefore neither the husband or wife was a competent witness for or against each other in a controversy between them, and a *third* party in any action, suit or other proceeding, although they may severally stand therein, as plaintiff and defendant. (p. 645.)
10. A case in which the decrees of the circuit court appealed from, are reversed, and the appellant decreed to pay the costs of the appeal to an appellee, as the party substantially prevailing in the appellate court.

Appeal from and *supersedeas* to two decrees of the circuit court of the county of Greenbrier, rendered respectively on the 12th day of June, 1880, and on the 11th day of Novem-

her, 1880, in a cause in said court then pending wherein Jennie Anderson was plaintiff, and William R. Snyder was defendant, allowed upon the petition of said Snyder.

Hon. Homer A. Holt, judge of the eighth judicial circuit, rendered the decrees appealed from.

WOODS, JUDGE, furnishes the following statement of the case :

In 1878 Jennie Anderson, the wife of Charles S. Anderson, filed her bill in the circuit court of Greenbrier county against her said husband, William R. Snyder, Rebecca A. Hunter and Fanny Hunter, alleging that on the 29th of June, 1875, her husband owned an undivided half of a tract of two hundred and eighteen acres of land, and that she owned one hundred and sixty acres of land worth at least forty-five dollars per acre, as her separate estate, and that all of said lands lie in Greenbrier county in this State; that said William R. Snyder on that day claimed to be the owner of two tracts of land in Roanoke county, Virginia, one of which was known as the "Margaret Johnson tract," which he represented to contain ninety acres, and to be worth sixty dollars per acre, and the other known as the "woodland tract," which he represented to contain six hundred acres and to be worth two dollars per acre; that said Snyder desiring to obtain her said one hundred and sixty acres of land, fraudulently and collusively combined with her said husband to deceive and mislead her in relation to the quantity, quality and value of said Roanoke lands, which she had never seen, and of which she had no personal knowledge; that said Snyder deceitfully, willfully and fraudulently misrepresented to her that the said "Margaret Johnson tract," contained *ninety* acres and was worth sixty dollars per acre; that the "woodland" contained six hundred acres and was worth two dollars per acre, that believing these representations to be true, and relying exclusively upon these representations as to the character, location, quantity and value of said lands made to her by said Snyder and her said husband, whom he had paid to aid in misleading and deceiving her, she was induced to enter into an agreement with the said Snyder on

the said 29th of June, 1875, whereby he bound himself to convey to her "*with deed of general warranty free from encumbrance*" said two parcels of land in Roanoke county, one containing *ninety* acres, and the other *six hundred* acres and to pay to her eight hundred dollars, in three installments, the last of which became due on the 1st of October, 1877, and all to bear interest from the 1st of October, 1875: that she and her said husband by deed dated the 29th of June, 1875, conveyed with covenants of general warranty to the said Snyder, her said one hundred and sixty acres, and her husband's said moiety of said two hundred and eighteen acres, "in consideration of certain lands and money, particularly set forth and described in said written agreement" with said Snyder; that in said deed a vendor's lien was retained on both of said tracts of land for the performance of said written agreement. Said bill further alleges that the said Snyder sold to her both of his said tracts of land by the acre: that she agreed to take, and did take the said "Margaret Johnson tract" at sixty dollars and the "woodland" at two dollars per acre; that since her purchase she has had the said lands surveyed, and has ascertained that said "Johnson tract" contains only eighty-two acres, and the "woodland" only five hundred and sixty-five acres; that the said "Johnson" land was not worth thirty dollars and the "woodland" not more than one dollar per acre; that no part of said eight hundred dollars has been paid to her, but Snyder claims he has paid the same to her husband, who she avers had no authority to receive the same: that her said one hundred and sixty acres on the 29th of June, 1875, was worth seven thousand two hundred dollars, while said Roanoke lands on that day, were not worth more than three thousand five hundred dollars, and that instead of eight hundred dollars she ought to have received three thousand seven hundred dollars as the difference in the value of said lands. Said bill further alleges that said Snyder on the 27th of July, 1875, by deed of that date conveyed the said one hundred and sixty acres, and said moiety of said two hundred and eighteen acres to the said Rebecca A. Hunter and Fanny Hunter, and thereupon prays, that the contract and deed of the 29th of June, 1875, between herself and husband and

said Snyder, may be canceled and annulled; that said Snyder be compelled to pay her the real difference in value between her one hundred and sixty acres, and the Roanoke lands; that she have compensation for the deficiency in the number of acres in said two tracts at the contract price; that she may have a decree for said eight hundred dollars, with its interest, that said lands conveyed to Snyder may be sold to satisfy her demands, and in case that said deed and contract can not be canceled, that said Snyder be compelled to convey to her said Roanoke lands by deed with covenants of general warranty free from encumbrances, and for general relief.

The defendants, Rebecca A. and Fanny Hunter and C. S. Anderson, never appeared in said cause, and the bill as to them was taken for confessed. The defendant Snyder answered the bill, to which answer the plaintiff replied generally. The answer admits the exchange of said lands, and the execution of the deed and contract of the 29th June, 1875; it alleges that Snyder has paid all the said eight hundred dollars; that a large part of it was paid to discharge liens existing on said one hundred and sixty acre tract, and on notes executed by said plaintiff, and the balance upon debts due from C. S. Anderson at his request, which were afterwards ratified by her. Said answer denies the said fraud, misrepresentation and deceit alleged in the bill; the said defendant denies that he represented said Johnson tract to contain ninety acres, or the "woodland" to contain six hundred acres. He avers that he refused to warrant the quantity of land in either of said tracts; that he made the contract with said C. S. Anderson, as the agent of the plaintiff, and that he knew more about the quantity and quality of the lands than defendant did, he having lived near them, and had had the "Johnson land" rented at one time; says he told said C. S. Anderson that his title papers called for eighty acres, though he believed it would run out eighty or ninety-five acres, and that at his request defendant inserted in the said written contract "*ninety acres more or less*," that the words "*more or less*" were inserted in said contract for the express purpose of excluding any warranty of quantity, and that this was fully understood and agreed to by said C. S. Anderson at the time; that he told

him he did not know the number of acres in the "woodland;" that he had bought five hundred and thirty-six acres of it from Burwell, and that there was an unknown quantity of his home place, of twenty-five to fifty acres, and it was put in the contract, of six hundred acres "more or less," without any other representation of the quantity, and with the distinct agreement that it was a sale in gross and not by the acre; he denies that the "Johnson tract" was exchanged at sixty dollars, and the "woodland" at two dollars per acre, but avers that both tracts were estimated and exchanged in gross, whether the quantity was more or less; he denies that he fraudulently colluded with plaintiff's said husband; and also that the terms of the exchange were discussed with plaintiff or in her hearing—further than to announce to her the conclusion, which she agreed to, upon condition that defendant would make her a present of a horse worth one hundred and fifty dollars—which defendant agreed to. He admits that he was not then prepared to convey said land, but avers he would be able to do so on the 1st November, 1878, when he would do so, and says that a vendor's lien was retained by the plaintiff on the lands conveyed to defendant as appears by her deed of 29th June, 1875. Said deed and written agreement are filed with said bill as exhibits, and are made part of it.

On the 14th of June, 1879, the cause was heard upon the bill taken for confessed as before stated, and upon the answer of Snyder, exhibits and depositions and referred to Commissioner John A. Preston, to state and report:

"1st. What deficiency, if any, there is in the 'Margaret Johnson' tract of land and its value per acre on the 29th of June, 1875.

"2d. What deficiency, if any, in the 'woodland' tract, and its value per acre on the 29th day of June, 1875.

"3d. What was the value per acre of the Jennie Anderson tract of land on the 29th day of June, 1875.

"4th. What was the value per acre of the C. S. Anderson tract of mountain land on the 29th day of June, 1875.

"5th. What was the true difference in value between the first two tracts and the last two, on the said 29th day of June, 1875.

"6th. What credits, if any, defendant, Wm. R. Snyder,

is entitled to, against his obligation to the plaintiff for eight hundred dollars, as per contract dated June 29, 1875.

"7th. Any other matter deemed pertinent or required by any party."

The plaintiff took the depositions of thirty witnesses including those of herself and husband; and the defendant, Snyder, took his own deposition and those of twelve other witnesses. The greater portion of this testimony was taken to show the values of said several tracts of land at the date of said exchange, and the deficiency in the number of acres in the Roanoke lands. Said commissioner reported that the Johnson tract contained eighty-one and one half acres, leaving a deficiency of eight and one half acres, and that said land of the date of said exchange was worth forty dollars per acre; that the "woodland" contained five hundred and seventy-four and one half acres, leaving a deficiency of twenty-five and one half acres, and that said land at said exchange was worth fifty cents per acre; that at the same date the one hundred and sixty acre tract was worth forty-five dollars per acre, and the moiety of the two hundred and eighteen acres was worth two dollars and seventy-five cents per acre; that said deficiency at the values ascertained by him, amounted to three hundred and fifty-two dollars and seventy-five cents, and at the prices alleged by said plaintiff, to five hundred and sixty-one dollars. He returned in his report three statements of the account between said plaintiff and said Snyder, numbered respectively 1, 2 and 3. The plaintiff excepted to statements 2 and 3 and also to so much of said report as fixed the value of said deficiency at forty dollars per acre for said Johnson tract, and fifty cents per acre for the "woodland," instead of sixty dollars per acre for the former, and two dollars per acre for the latter. Said defendants filed no exceptions to said report.

On the 10th day of June, 1880, the defendant Wm. R. Snyder executed and filed in said cause a paper writing in these words:

"Consent for rescission by W. R. Snyder:

JENNIE ANDERSON

vs.

WILLIAM R. SNYDER & *als.* }

"The defendant, William R. Snyder, hereby consents that

inasmuch as the plaintiff charges in her bill that in the exchange of lands made and mentioned in her bill she was overreached and defrauded, this charge he pronounces untrue, and to show his confidence in the fairness and justice of said exchange, he here offers and consents that the prayer of the plaintiff's bill asking for a rescission of said sale may be granted her by the court, and that the parties thereto be restored to their rights as they were before said contract and sale were entered into, which he avers can be done.

“WM. R. SNYDER.”

“June 10, 1880.

On the 12th of June, 1880, the court entered in said cause the following decree :

“This cause came on this day to be again heard upon the papers formerly read, the answer of Wm. R. Snyder, general replication to said answer, the report of Commissioner John A. Preston made pursuant to a former decree in this cause, with exceptions endorsed on said report, the exhibits filed, depositions of witnesses, the written consent of said W. R. Snyder to a cancellation and rescission of the contract made between him and the said Jennie Anderson according to the prayer of her bill, and was argued by counsel. Upon consideration whereof, it is adjudged, ordered and decreed that the said contract between the said Jennie Anderson and Wm. R. Snyder, and the said deed made by the said Jennie Anderson and her husband, C. S. Anderson, to the said Wm. R. Snyder, both dated the 29th day of June, 1875, be canceled and rescinded, and that the said Wm. R. Snyder reconvey unto the said Jennie Anderson the one hundred and sixty acres in said deed mentioned, and to the said C. S. Anderson the one half of the two hundred and eighteen acres in the proceedings and said deed of the 29th day of June, 1875, mentioned and described, and that said Snyder shall procure his wife's signature and acknowledgment to such deeds of reconveyance, and that the said parties remain in possession as they now are until the report hereinafter directed is taken and confirmed by the court; and it is further adjudged, ordered and decreed that this cause be referred to John A. Preston, a commissioner of this court, who shall take an account between the said Jennie Anderson and the said Wm.

R. Snyder, showing the full amount of the debts and credits due from one and to the other, also an account to show what is necessary to put the parties in *statu quo*, and whether or not the same can now be done, and report to this court at its next term, but before proceeding to take such account said commissioner shall give notice of the time and place to the said parties, or their attorneys, and it is further ordered that Jennie Anderson recover her costs in this suit expended."

The account directed by said decree, with a large mass of testimony was taken on the points submitted, covering eighty pages of the printed record in this cause, and reported to the court at the November term, 1880. This report in substance adopted statement "1" of former report, as showing the state of the account between Snyder and plaintiff, which on that point was not excepted to by any of the parties, although both plaintiff and said Snyder excepted to it on other grounds, which from the view we take of the case, are unnecessary to be stated. On the coming in of this report, the court on the 11th day of November, 1880, entered a decree, settling the principles in the cause, from which the defendant, Wm. R. Snyder, obtained an appeal and *supersedeas* to this Court.

A. F. Mathews for appellant.

Davis & Rucker for appellee cited 78 Ill. 412; 71 Ill. 475; Code, ch. 130; 1 W. Va. 216; 2 Tuck. Com. (3d Ed.) 44; and Bas. Abr. "Attorney" H.

WOODS. JUDGE, announced the opinion of the Court:

The first reflection that occurs in the consideration of the questions arising out of this case is, that the circuit court committed no error to the prejudice of the appellant by its decree founded upon his consent to the cancellation of said deed from plaintiff and her husband to the defendant, Snyder, for the said Greenbrier lands, and of said agreement to convey to said plaintiff said Roanoke lands; the second reflection is, that such a cancellation by consent of said Snyder and the plaintiff, and without any proofs to authorize the same, *might*, and for aught that appears, probably would do irreparable injury to the defendants, Rebecca A. and Fanny

Hunter, to whom the said Snyder had conveyed said Greenbrier lands on the 27th July, 1875. It is true they have never appeared in the court below nor made defense to the plaintiff's bill; nor have they appeared, or in any manner complained in this Court, of the proceedings of the said circuit court. It may be that they are under the impression that their said vendor, Snyder, is defending their interests in the controversy: it may be, that as the said bill wholly fails to allege against them any facts, which if proved, would authorize the court to deprive them of their title to said lands, they are resting in false security, under the assurances of said Snyder, that they will be fully indemnified against any loss arising from the cancellation of said agreement and deed of 29th June, 1875. Having no means of determining whether the interests of these persons, who, according to the pleadings in this case, must be held to be innocent purchasers, are secured or not; and perceiving that they may be greatly injured, this Court will, in the case provided for in its ninth rule of practice, "consider the whole record as before it, and will reverse the proceedings in whole or in part in the same manner as it would do, were the appellee or defendant, to bring the same before it, either by appeal, writ of error or *superseas*, unless such error be waived," &c. Acting under the spirit of this rule, we will consider this case as if each of the defendants, Rebecca A. and Fanny Hunter, and Charles S. Anderson, had appealed from the said decree rendered in said cause on the 11th November, 1880.

From an examination of the plaintiff's bill itself, it will be manifest that she places but little reliance on the grounds alleged for a rescission and cancellation of her said deed and contract, to, and with the defendant Snyder. It is not pretended in the bill that there was any mistake in reducing said contract to writing, whereby the real intention of the parties was defeated, nor that the whole, or a material part of the consideration thereof had failed, or that the contract was procured to be executed by the fraud of the defendant Snyder, or that any specific wrongful act was done by him to induce her to enter into said agreement, except that the parcels were sold by the acre, and that the "Johnson tract" was represented to contain ninety acres, and the "woodland" six

hundred acres, and that the former is deficient eight, and the latter thirty-five acres. It is not pretended that the contract was illegal or against public morals or public policy. It is true she alleges in general terms that said Snyder and her husband "frandulently and collusively combined in procuring her agreement to trade said lands," and that "she has been informed and believes that said Snyder paid her husband to aid him in misleading and deceiving her as to the value of said lands," but no specific acts done, or statements made on this subject are set forth. It would seem that the representations made by Snyder as to the value of said lands are nothing more than such expressions of opinion, in regard to the value of said lands, as are usually made by vendors, and for that reason very little relied upon by the purchasers. No other fraud, actual or constructive is alleged. The contract was neither illegal nor contrary to good morals, or public policy; nor has any material part of the consideration failed, nor was there any mistake in the execution of the contract. These are the grounds on which courts of equity grant relief by rescinding and canceling agreements, and deeds which would otherwise be held valid. Story Eq. Juris. sections 161, 439, 695.

The testimony taken in this case which was before the court when it rendered the decree on the 12th of June, 1880, canceling said agreement and deed dated the 29th of June, 1875, between the plaintiff and the said Snyder was wholly insufficient to warrant or sustain such a decree, and we are satisfied, that but for said written consent of the said Snyder, and the apparent indifference of the other defendants, no such decree would have been rendered. While the said decree of the 12th of June, 1880, contains no error of which the appellant has a right to complain, and if he alone was interested therein, it would not be reversed, yet because the same is erroneous, as to the said Rebecca A. Hunter and Fanny Hunter, and is, or may be, greatly to their prejudice, we are of opinion that the same must be wholly reversed, which leaves the case before us, precisely in the same condition in which it stood on the 12th of June, 1880, when the cause came on to be heard by the said circuit court.

The plaintiff in support of her pretensions, examined as a

witness in her behalf, her said husband Charles S. Anderson, whose testimony was excepted to by said Snyder, on the ground that he was incompetent to testify on behalf of the plaintiff, who was his wife.

The general rule of the common law is, that a party to the record cannot be a witness either for himself, or for a co-suitor in the cause. This rule is founded not solely in the consideration of interest, but also in the expediency of avoiding temptations to commit perjury. 1 Greenl. Ev. § 329. This rule applies to husband and wife, neither of them being admissible as a witness in a cause civil, or criminal, in which the other is a party, nor in any cause in which the *interest* of the other is involved. But this exclusion is founded partly on the identity of their legal rights and interests at common law, and partly on principles of public policy, which lie at the basis of civil society; and this principle of public policy continues the exclusion of their testimony for or against each other, even after all identity of their legal rights and interests have ceased to exist. *Ib.* §§ 334, 335, 337.

By section 22 of chapter 130 of the Code no witness in any civil action, suit or proceeding can be excluded by reason of his interest in the event, thereof.

If the testimony of a husband or wife, who was not a party to a suit, offered in behalf of the other, who was such party, had been excluded only because of the interest of such witness in the event of the suit, this section would have rendered such husband or wife a competent witness for or against each other; but as they were also excluded on principles of public policy, and as such exclusion remained unaffected by said section they continue to be incompetent as witnesses for or against each other, excepting only in the case provided for in the fifth exception to the twenty-third section of said chapter. By the said twenty-third section the common law rule which excluded all parties to the record as witnesses for or against each other, was so modified as to render all parties to any civil action, suit or proceedings competent witnesses for or against each other in the same manner and subject to the same rules of examination as other witnesses, with certain specified exceptions, the only one of which necessary to be considered here, is the fifth, which is in these words: "A hus-

band shall not be examined, for or against his wife, nor a wife for or against her husband except in an action or suit between husband and wife."

The construction of said sections 22 and 23 of chapter 130 of the Code of West Virginia was considered by this Court in the the cases of *Hill et ux. v. Proctor* and of *Proctor v. Hill et ux.*, reported in 10 W. Va. 59. It will be observed that Hill and wife, in both cases were parties on the *same* side, and that the suits were in fact, in relation to a controversy between Proctor and them, and was not in any sense a controversy between said Hill and his wife. The deposition of Hill was taken in the progress of the cause in regard to the boundary of a tract of land in which he and his wife were equally interested; this deposition was excepted to, on the grounds that he was incompetent to testify to any matter affecting his wife's interest in the subject-matter of said suit. Upon an appeal to this Court he was held to be an incompetent witness, and this Court held that said sections 22 and 23 of chapter 130 "made no material change in the common law as to husband and wife giving evidence for or against each other in a cause in which they are parties, *except in an action or suit between husband and wife*. In such case the fifth exception to section 23, so modifies the common law as to allow husband and wife to be witnesses for and against each other in suits between themselves."

This question was again before this Court in the case of *Rose & Co. v. Brown et ux.* reported in 11 W. Va. 122. In this case Brown and wife, were both parties defendant; the controversy was not between said Brown and his wife, but between them and the plaintiffs, who were seeking to set aside a deed made to the said wife. Brown's deposition having been taken on behalf of his wife, and not excepted to, was read on the final hearing of the cause in the court below. But this Court upon an appeal held, that said Brown was incompetent to testify on behalf of his wife, and permitted the objection to be made for the first time to the reading thereof in this Court, and re-affirmed the doctrine laid down, upon that subject, in *Proctor v. Hill et ux.*, *supra*.

In the case at bar, the wife is plaintiff, and her husband, C. S. Anderson, Wm. R. Snyder and others are defendants.

While the bill contains some vague charges of fraud against her husband, in connection with the defendant, Snyder, to which he makes no defense, which are wholly unsupported by the evidence it is manifest, that there is not only no controversy between the plaintiff and her husband, in regard to the subject matter of this suit—but that they are perfectly in accord with each other; and that the only controversy in this suit, is between the plaintiff and her husband on one side, and the defendant, Wm. R. Snyder, on the other. While we hold, that sections 22 and 23 of chapter 130 of the Code do not materially change the common law as to husband and wife giving testimony for or against each other in a cause in which they are parties, except in an action or suit between themselves; and that said fifth exception to section 23 only modifies the common law rule of evidence, so far as to allow the husband and wife to be witnesses for and against each other in suits between themselves, yet we hold, that the words “action, suit or other proceeding,” as used in the first clause, and the words “action or suit” as used in said fifth exception, are to be taken and held as synonymous with “*controversy*,” and not merely as designating the particular mode in which the controversy may be presented to the court by “action” (at law), “suit” (in equity), or “other proceeding;” and that this “controversy” in whatever form presented, must be between the husband and wife, before either can be a witness for or against the other; and that they cannot evade the force of this common law rule of evidence, where the controversy is between one, or both of them, and a stranger by one of them becoming plaintiff and suing the other as a defendant, with such stranger. This Court will ascertain where the controversy in fact is, and between whom it arises. If the controversy arises between a stranger and the husband and wife, or between him and either the husband or wife, then in such a controversy both husband and wife are incompetent as witnesses for, or against each other. We are therefore of opinion that the said fifth exception to said section 23 is to be construed as if the same were in these words: “A husband shall not be examined for or against his wife, nor a wife for or against her husband, except in a ‘*controversy*’ between husband and wife.”

The controversy in the case at bar being between the plaintiff and her said husband C. S. Anderson on the one side, and the defendants Wm. R. Snyder, Rebecca A. Hunter and Fanny Hunter on the other, the said C. S. Anderson was incompetent to testify on behalf of the plaintiff who is his wife, and the exceptions to the reading of his deposition, ought to have been sustained.

It remains to consider whether the said agreement dated the 29th of June, 1875, made between the said Wm. R. Snyder, and the plaintiff, was a sale of said Roanoke lands to her in gross, or a sale by the acre, and whether she is entitled to compensation for any deficiency in the number of acres, alleged to be contained therein, and if so what is the amount of compensation to which she is entitled for such deficiency.

By the terms of said agreement dated the 29th of June, 1875, between said Wm. R. Snyder of the first part and said plaintiff of the second part, in consideration of the conveyance to him of said lands in Greenbrier county, the said Snyder sold, and bound himself to convey by deed of general warranty free from encumbrance to the said plaintiff "all that portion of the home place of Mrs. Margaret Johnson purchased by said William R. Snyder in March, 1875, lying adjoining the town of Salem on the west side, the lands of F. J. Chapman and Dr. Thos. Dillard, excepting thirty acres of said home place, on which the residence and buildings of said Mrs. Margaret Johnson are situated—the said thirty acres lie fronting on the McAdamized road ninety-six poles, running north fifty poles, east ninety-six poles and south fifty poles—leaving a balance of ninety acres of said home place, more or less, which is to be conveyed by said William R. Snyder to said Jennie Anderson; also six hundred acres, more or less, of woodland lying about two miles north of the town of Salem, consisting of that portion of the home place of C. L. Snyder, deceased, conveyed to said William R. Snyder by F. Johnson, administrator *de bonis non* of said C. L. Snyder, deceased, five hundred and thirty-six acres purchased by said William R. Snyder of C. W. Burwell, administrator of Nathaniel Burwell, deceased, at a sale of said lands of said Nathaniel Burwell adjoining the lands of George Stevens, F. J. Chapman and others; the said two parcels

adjoining each other, and making six hundred acres, more or less, of woodland as aforesaid," all of which lands were situated in Roanoke county Virginia.

In the case of *Crislip, Guardian, &c., v. Cain*, reported in 19 W. Va. 438, this Court decided, that "if a vendor by his written contract agrees to convey for a specified price, a tract of land described by metes and bounds or otherwise, with the words added, containing a specified number of acres, this, on the face of such contract is a contract not by the acre, but in gross, and without any implied warranty of the quantity; and that the law as above stated would not be varied by the statement of the vendor in said contract that the land contained a specified number of acres "more or less," as this statement would be no less positive than the other; for the words more or less are not construed to mean, 'as estimated,' 'as supposed,' but are construed to mean about the specified number of acres, and are designed to cover only such small errors as usually occur in surveys." In the same case it is further held, that such a contract not being ambiguous on the face of it no parol evidence is admissible to explain, alter or modify it, by showing it was a sale by the acre and not a sale in gross—and that in such a case, in the absence of any fraud on the part of the vendor, no abatement on account of a deficiency in the number of acres is allowed as it was the result of a mutual innocent mistake of the parties. *Ib.* syllabus 14 p. 441.

Applying these principles to the said contract of the 29th of June, 1875, we find that the terms thereof bring it precisely within the rule laid down in *Crislip, Guardian, &c. v. Cain*; that it is a sale in gross, and not a sale by the acre, that no warranty of the number of acres are thereby implied: that no ambiguity exists upon the face thereof, and therefore none of the parol testimony taken in the case can be used to explain, alter or modify the same, and that the said plaintiff is not entitled to any compensation for that cause on account of any deficiency in the quantity of said lands.

But although the sale be in gross and not by the acre, yet if the vendor induce the vendee to purchase, falsely represents to him that the land contains a specified number of acres, or that number, "more or less," and the vendee relies

on the truth of such representations, and is thereby induced to purchase the land as containing about that number of acres, at a price he would not otherwise have given for it, such representations even where there is no fraud, may amount to an implied warranty of the number of acres, and the vendor may be compelled to account to said vendee for any deficiency in the quantity of the land. And if such statements be not qualified by the vendor, the vendee has a right to believe and to rely upon them, as having been made on the personal knowledge of the vendor, and a vendee may, and he naturally does, rely upon such representations of his vendor as to the quantity of said land. And as the quantity of the land is generally a material matter in the purchase of a tract of land, it ought *prima facie* to be regarded, that the vendee was induced to pay, or to agree to pay the price named in the said contract, because of the statement contained in it of the number of acres in the tract of land sold; and in the absence of all proof, the vendor must be regarded as guilty of a fraud on the vendee, and for this reason also a court of equity will require him to make to the vendee a proportionate abatement of the purchase-money if the same be not paid; and by the same process of reasoning, if the vendee has paid all his purchase-money the vendee may compel the vendor to make compensation (if such statements be untrue) if any material deficiency in the number of acres is found to exist. These principles are fully discussed in the exhaustive argument of Judge Green in delivering the opinion of the Court in the case of *Crislip, Guardian, &c. v. Cain*, reported in 19 W. Va. 438.

The plaintiff in the case at bar, by the allegations of her bill brings herself within the rule laid down in the last two propositions. The testimony fully establishes the fact that in the "Johnson tract" there is a deficiency of eight and one half acres, and in the "woodland" tract of twenty-five and one half acres. There is some conflict between the testimony given by the plaintiff, and that given by the defendant Wm. R. Snyder. She testifies that the one hundred and sixty acres of land in Greenbrier county was her separate property (and this is not denied) that her husband was never authorized to sell, or contract to sell her said land to said

Snyder, and that the negotiations for the sale thereof were conducted between herself and Snyder; that she alone agreed on the terms of the exchange; that he represented to her that the "Johnson land" contained ninety acres, and the "woodland" six hundred acres; that she took his word for it; that she had no knowledge at all of said lands; that she never saw said lands before said trade, nor until five months afterwards; that she went by what her husband and Snyder said about the lands; that Snyder always valued both of said tracts in Roanoke at so much an acre, and he finally put the "Johnson land" at sixty dollars and the "woodland" at two dollars per acre; that Snyder said there was ninety acres in the one tract, and six hundred acres in the other; that he never valued said land at any time by the tract or boundary, but always at so much an acre; that she took one tract at sixty dollars and the other at two dollars per acre; that Snyder said the "Johnson tract" was an old survey, and might run out one hundred acres, and that he would insure her ninety acres, and that in the summer of 1877, and since she had ascertained the deficiencies to exist she went to settle with him, and she told him the land did not hold out and that he replied to her "it did hold out, and that Uncle John Snyder who surveyed it for you was not in his right mind;" that he refused to settle at all, and said he had his lawyer picked out; that the reason he gave for refusing to settle was, that there were ninety acres of the "Johnson land," and six hundred acres of the "woodland." She further testified that the negotiations with said Snyder took place at her home and not elsewhere, and that no one was present but herself and husband and said Snyder, and that the writings were prepared by Mr. A. C. Snyder at his office and were executed at the house of Mrs. White in her presence and in the presence of her mother and J. Preston; that Snyder has never paid to her any part of said eight hundred dollars. Another witness, John Snyder, was examined on behalf of plaintiff who testified that he had been the surveyor of Roanoke county for twenty-five years; that he told said Wm. R. Snyder that the "Johnson tract" contained eighty-two or eighty-three acres; that both before and after the trade with the plaintiff said Snyder represented one of said tracts to

contain ninety acres, and that the same was very fine land, and would soon be worth one hundred dollars per acre. No other witness except her husband was examined on her behalf on this branch of the subject, and his testimony upon the exception of said Snyder thereto has been excluded as incompetent.

The defendant Snyder was the only witness examined in his behalf upon these same questions. The defendant Snyder in his answer to the plaintiff's bill and in his deposition states that all of the negotiations about the exchange of said lands were made by him with said Charles S. Anderson, the husband of said plaintiff; that he and said husband agreed upon the terms of the exchange of said lands, and that she only ratified them. In his said answer to said bill he admits that he told the plaintiff's husband during their negotiations that his title papers called for but eighty acres in the "Johnson land," though he believed it would run out eighty-five or ninety acres, and that at the request of her said husband it was put in the written contract at "*ninety acres more or less*," that the words "more or less" were put in the contract for the express purpose of excluding any warranty of the quantity of land, and *this was fully understood and agreed to* by her said husband, and that the same was true also in regard to the "woodland" tract; he denies in his deposition that these terms were discussed in the hearing of the plaintiff, further than to announce to her the conclusions, which she agreed to upon condition that witness would make her a present of said horse.

The testimony of the said husband being out of the case, there is no evidence to sustain the allegation of the answer that the negotiations were made with the said husband, and not with the plaintiff herself, except the deposition of the defendant Snyder himself, who further testified that in May, 1875, the plaintiff and her said husband visited Roanoke county, and on their return *they* came to his house and urged and requested him to trade them *eighty acres* of his "Johnson land" for their home farm and mountain land in Greenbrier county, all of which statements are emphatically denied by the plaintiff in her deposition; he further testifies that on the 29th of June, 1875, he went to the plaintiff's

home to make the trade; that he discussed the terms of it with her husband on the porch, not in her hearing; that plaintiff's husband offered to take the eighty acres of the "Johnson land" at four thousand eight hundred dollars, the six hundred acres at one thousand two hundred dollars and wanted one thousand six hundred dollars difference; that defendant Snyder thought that this price for the Greenbrier lands was too high; that he then told said husband that he could sell the Johnson land at sixty dollars per acre; that he believed the eighty acres would amount to eighty-five or ninety acres; that there was originally four hundred acres in the tract; that a good deal had been sold off in lots, and that as well as he could remember (not having the plats with him) there was eighty-five acres left, and that he was satisfied it would not be less, and that taking all things into consideration, he did not think he ought to give more than six thousand eight hundred dollars for said Greenbrier lands, that is forty dollars per acre for the one hundred and sixty acres and four hundred dollars for the mountain land, and that he (the plaintiff's husband) could have the eighty acres, "more or less" of the "Johnson land" at four thousand eight hundred dollars, the six hundred acres "more or less" for one thousand two hundred dollars, and eight hundred dollars difference; that said husband said he would go and see the plaintiff; that in a short time he returned and said the plaintiff would be satisfied if defendant would give her in addition, a horse worth one hundred and fifty dollars, and would let the husband have a bull, and would square accounts with him; that he agreed to do so, and the plaintiff came out on the porch and approved the trade; that on the next day they went to the office of A. C. Snyder, that said C. S. Anderson called witness out and expressed some fears that his mother-in-law who had dower in said one hundred and sixty acres, might be unwilling to relinquish it, and wanted witness to put the "Johnson land" in the contract at *ninety acres "more or less,"* and if it was necessary, he would make his mother-in-law believe it was more. Mr. A. C. Snyder then drew up the papers in accordance with Mr. Anderson's wishes in this respect.

The defendant Snyder further testified that said Anderson

knew a great deal more about the land than he did, having had it rented for one or more years before the war, and that he more than once declared during the negotiations for the trade, that from his personal knowledge of the land, and its bounds he was satisfied there were ninety acres or more; that he made the trade with the plaintiff's husband *alone, no one else being present*; that the plaintiff approved of it after the trade was made; that he did not represent the "Johnson land" to said C. S. Anderson as containing ninety acres, nor the "woodland" as containing six hundred acres, but told him that from what the surveyor had told witness, he believed it would be eighty-five or ninety acres, and that he sold it to said C. S. Anderson for *eighty* acres "more or less," and the "woodland" for six hundred acres "more or less;" and that he regarded the "Johnson" land as well worth sixty dollars per acre; that he was not well acquainted with said "woodland," but that he had sold land of the same quality adjoining it at five and seven dollars per acre. On cross-examination he further testified that he did not tell the plaintiff, that there were only *eighty acres* in the "Johnson land," having every reason to believe there was more; and that he paid out none of said eight hundred dollars to said plaintiff or upon her order, except fifty dollars on the horse which cost two hundred dollars instead of one hundred and fifty dollars. It will be observed that every statement made by the defendant Snyder, in regard to the negotiation of the trade having been made with the said C. S. Anderson is expressly denied by the plaintiff; he alleging that every proposition and representation in regard to said exchange of lands was made to, and with said husband alone; and she, that all the negotiations were made between herself and said Snyder, and not between him and her said husband; and that Snyder did represent and insure the said lands to contain ninety and six hundred acres, both before and at the time of the trade, which she believed to be true, and took the lands on his word; he alleging that he believed the "Johnson land" did contain eighty-five or ninety acres, or perhaps one hundred acres, and that he consented to put the "Johnson land" in the contract at ninety acres for the doubtful purpose of enabling said Anderson to deceive his mother-in-law, as to

the correct number of acres. The plaintiff and said Snyder both agree that no person was present during said negotiations except themselves and said husband of the plaintiff. Assuming that all of them are equally worthy of credit as witnesses, it seems unfortunate for the defendant Snyder, if his testimony is true, that by his exceptions to the testimony of said husband, he should have placed himself in a position where it is impossible to corroborate his testimony by that of said Anderson. The said Snyder knew that the said tract of one hundred and sixty acres of land, which was the principal subject in said negotiations, was the separate property of said plaintiff. It is proved and not contradicted that the plaintiff had never seen, and that she knew nothing at all, about the quantity or value of said Roanoke lands, and that she took them on the word of said Snyder. So far as this record shows, the defendant, Snyder, took no pains to inform the plaintiff of any of the statements or representations made by him to her husband during said negotiations, and he does not even deny her statement made in her deposition, that she called on him for a settlement and informed him of the deficiencies in said lands, and that he then insisted that the "Johnson land" did contain ninety acres, and the "woodland" six hundred acres, and that "Uncle John Snyder who surveyed the land for her was not in his right mind." But after the negotiations were all at an end, and the contract was to be put in binding form; and the plaintiff and her husband had executed to said Snyder a deed with covenants of general warranty for said one hundred and sixty acres, and the moiety of said two hundred and eighteen acres of land in Greenbrier county, he executed said agreement with the plaintiff dated the 29th June, 1875, reciting that in consideration of the conveyance to him of said lands, he sold and agreed to convey to *her*, all that portion of the home place of Margaret Johnson, &c., "leaving a balance of *ninety acres*, 'more or less,' and also *six hundred acres*, 'more or less,' of 'woodland,' &c., consisting of two parcels described in said contract, the said 'two parcels adjoining each other, and making *six hundred acres*, 'more or less,' of 'woodland' as aforesaid.'" There is nothing in the terms of this contract to inform the plaintiff that she had not a right to

rely thereon; or that any less quantity was contained in said tracts, than what is specified therein. It is apparent from all of the statements of the defendant, Snyder, that he intended to derive every possible advantage to himself by representing the "Johnson land" to contain ninety, and the "woodland" six hundred acres, supposing all the time that he was effectually guarding himself against liability in case of a deficiency in the number of acres, by adding the words, "more or less" to the specified quantity in each tract. It may be that said Snyder had good reason to believe, and that he did believe that said tracts did actually contain said specified number of acres, yet if he made such representations to the plaintiff without qualification, and in such a manner as to lead her to believe they were made upon his personal knowledge, and she having no knowledge of the said lands relied upon such representations, and was thereby misled to her prejudice, and induced to purchase the same, at the price agreed upon, and such representations as to the quantity of said lands are untrue, he will be held liable to make compensation for such deficiency if the said purchase-money has been paid.

The measure of compensation is the contract price of the land by the acre if the same can be ascertained; but if the same be unascertainable, then the average value by the acre of the tract of land in which the deficiency exists must furnish such measure of compensation. The testimony in this cause does not disclose the contract price of either of said parcels of land, but it fully warrants the report of Commissioner Preston, that on the 29th June, 1875—the said "Johnson land" was worth forty dollars—and said "woodland" fifty cents per acre, and that the value of said deficiencies on that day was three hundred and fifty-two dollars and seventy-five cents. By the said first report of Commissioner Preston it appears to the satisfaction of this Court by sub-statement No. 2, that there remains due from said Snyder to the plaintiff upon said eight hundred dollars of purchase-money, agreed to be paid for the difference in the value of said lands, the sum of four hundred and twenty-three dollars and eighty-one cents with interest thereon from the 25th day of May, 1878. We are therefore of opinion that the plaintiff's exceptions thereto, and to the first general state-

ment of said report fixing the value of said deficiencies at three hundred and fifty-two dollars and seventy-five cents be overruled, and that said report as to said portions so excepted to, be confirmed, and that plaintiff's exceptions to sub-statement No. 3, and to general statement No. 6 of said report be sustained.

Upon consideration of the pleadings and proofs in this cause we are of opinion that the plaintiff is not entitled to have the said deed and contract of the 29th June, 1875, canceled and annulled; nor is she entitled to claim from the defendant Snyder any other or greater sum as the difference in the value of said lands than the said sum of eight hundred dollars with interest thereon from the 1st day of October, 1875, after deducting therefrom such credits as he was entitled to; but she is entitled to a conveyance by deed with covenants of general warranty free from encumbrances, of the said lands in Roanoke county, Virginia, and also to the said sum of three hundred and fifty-two dollars and seventy-five cents as of the date of the 29th of June, 1875, being the amount of compensation ascertained to be due to her from said Snyder as of that date which ought to have been applied to extinguish that much of the credits allowed by Commissioner Preston in sub-statement No. 2 of his report, as credits upon said sum of eight hundred dollars thereby reducing the balance due thereon to the sum of four hundred and twenty-three dollars and eighty-one cents, with interest from the 25th of May, 1878, still due to her from Snyder; and not having been so applied this Court will treat the same as if it had been so done, and as both of said sums three hundred and fifty-two dollars and seventy-five cents and four hundred and twenty-three dollars and eighty-one cents, do not exceed the said sum of eight hundred dollars to secure the payment of which a vendor's lien was retained upon said lands in Greenbrier county, this Court holds the said vendor's lien as still existing not only to secure to the said plaintiff the payment of said sum of four hundred and twenty-three dollars and eighty-one cents with interest from the 25th of May, 1878, but also of the said sum of three hundred and fifty-two dollars and seventy-five cents with interest from the 29th of June, 1875.

For the reasons hereinbefore stated the decrees of the circuit court of Greenbrier county entered in this cause on the 12th of June, 1880, and on the 11th day of November, 1880, are wholly set aside, reversed and annulled, and this cause is remanded to the circuit court of Greenbrier county for further proceedings therein to be had according to the principles settled in this opinion. And inasmuch as the decree wrongfully entered in this cause on the 12th of June, 1880, for which error the said decrees of the said circuit court are now reversed, appears to have been so entered by the consent of the defendant William R. Snyder, to the cancellation of said contract and deed of the 29th of June, 1875; and as the appellee Jennie Anderson is the party substantially prevailing in this Court, it is adjudged, ordered and decreed, that the appellant do pay to the appellee, Jennie Anderson, her costs by her about her defense in this Court expended.

JUDGES JOHNSON AND GREEN CONCURRED.

DECREE REVERSED. CAUSE REMANDED.

WHEELING.

TAVENNER v. BARRETT *et al.*

BARRETT *et ux.* v. TRACEWELL, TRUSTEE, *et al.*

Submitted June 20, 1882—Decided April 28, 1883.

(*WOODS, JUDGE, Absent.)

1. An agent for the purchase or sale of an estate, though he transact the business in his own name, is generally not a proper party to a suit brought for the specific execution of the contract of sale or purchase. But if he be an agent to sell, and makes the sale, and takes of the purchaser bonds for the purchase-money payable to himself, and these bonds are secured by a deed of trust executed by the purchaser conveying other lands of his to secure such bonds, then in a suit brought by the vendor to enforce specifically such contract, and to enforce the collection of such purchase-money bond, such agent must be made a party either

*Cause submitted before Judge W. took his seat on the bench.

21	656
85	473
36	799
21	656
38	639
21	656
49	471
21	656
43	190
21	656
46	402
46	467
21	656
49	115
21	656
60	229
21	656
66	259

plaintiff or defendant, for in such case he is not simply an agent, but he is a trustee holding the legal title to such bonds for the use of the real vendor of said land. (p. 673.)

2. In such case such agent or trustee may be made a co-plaintiff with the vendor, or he may be made a defendant with the vendee, the vendor being made the sole plaintiff. (p. 675.)
3. If however the fact was, that such agent was not a trustee, but a mere agent, and could not properly be made a party to a suit for specific performance, but was improperly made a co-plaintiff with the vendor, the objection to such impropriety of proceeding would be properly made by a demurrer to the whole bill. (p. 673.)
4. To justify the court in sustaining a demurrer to a bill for a specific performance filed by a vendor, the ground of the demurrer must be a short point, upon which it is clear, that the bill would be dismissed with costs at the hearing; if the evidence to be taken might sustain the relief asked with some modification, the demurrer ought to be overruled, and the case stand to the hearing to be disposed of on its merits. (p. 680.)
5. It is not necessary, that the bill for a specific performance filed by a vendor should show, that he had a valid legal title to the land sold; on the contrary the bill could not be demurred to though it appeared on the face of the bill, that he not only did not have a good legal title to the land, but that he had not any title legal or equitable to a portion of the land, and that he never could acquire a good title thereto, provided this portion was an insignificant part of the land sold, as the court would in such case decree specific performance with compensation. (p. 680.)
6. In such cases generally time is not regarded as of the essence of the contract, and the vendor's title may have been imperfect when he sold the land or when he brought the suit, it is sufficient if he can make it perfect before the report is made upon it during the progress of the suit, and time is frequently given him for that purpose; hence he cannot be required to tender and file a good deed with his bill. (p. 680.)
7. On a contract for the sale of land the vendor is entitled to a general warranty deed, where the vendor is seized of the land in his own right, unless the contrary is agreed upon; but if the vendor be an executor, trustee or commissioner of the court, the vendee is entitled to a deed with special warranty only. (p. 681.)
8. Where a party purchases land of a special commissioner of the court, and his purchase is confirmed, but before a deed is made to him, he executes a power of attorney to the special commissioner authorizing him to sell this land for him, and the special commissioner does so and signs a written contract agreeing to

convey this land to the purchaser on the payment of the whole of the purchase-money, signing the contract as special commissioner and attorney in fact of the first purchaser. **Held:**

The true meaning of such contract is, that the sub-purchaser takes a deed from the special commissioner with the assent of the first purchaser, and therefore he is in such case only entitled to a deed with special warranty of title. (p. 682.)

9. If a report be made showing the liens on a debtor's land and their priorities, which the bills asks may be sold, and afterwards a demurrer to the bill is sustained, and an amended bill filed making a large number of lienors parties, who were not parties to the suit originally, such commissioner's report ought not to be confirmed, but a new order of reference should be made by the court to ascertain the liens. (p. 684.)
10. A decree can not be made between co-defendants, unless it be based on pleadings and proofs between the plaintiffs and defendants. But in a bill asking, that the liens on a debtor's land be audited, and their amounts and priorities settled, and the debtor's land sold to pay the same, though the bill admits, that a particular debt is a lien and is unsatisfied, the debtor or any other lienor may dispute the validity of such lien, and such a controversy may be decided by the court without violating the above rule. (p. 685.)
11. A deed of trust is executed by a man and his wife to two trustees to secure a debt, the grantors in the deed acknowledge it before one of the grantees, a trustee, as a notary public, and on this acknowledgment it is admitted to record. **Held:**
Such acknowledgment and recordation are invalid, and the deed is an absolute nullity as to the married woman, and is to be regarded as an unrecorded deed as to the male grantor. (p. 687.)
12. A certificate of a privy examination, which fails to show, that the married woman had the deed fully explained to her is fatally defective, and the deed void as to her. (p. 670.)
13. Common law judgments or judgments of justices of the peace against a married woman on her contracts made during coverture, and judgments rendered by courts having no jurisdiction in such cases, are nullities creating no lien on her separate real estate. (p. 692.)

Appeal from and *supersedeas* to a decree of the circuit court of the county of Wood, rendered on the 18th day of October, 1879, in two causes in said court then pending, which were heard together, in one of which Ann R. Tavenner was plaintiff, and C. G. Barrett and others were defend-

ants, and in the other of which C. G. Barrett and wife were plaintiffs, and R. C. Tracewell, trustee, and John Buford were defendants, allowed upon the petition of The Life Insurance Company of Virginia and of C. G. Barrett and Sarah V. Barrett, his wife.

Hon. J. M. Jackson, judge of the fifth judicial circuit, rendered the decree appealed from.

GREEN, JUDGE, furnishes the following statement of the case:

These are two separate appeals, the one by The Life Insurance Company of Virginia, and the other by C. G. Barrett and Sarah V. Barrett, his wife, from a decree entered by the circuit court of Wood county on October 18, 1879, in two causes pending in said court, in one of which Ann R. Tavenner was plaintiff, and C. G. Barrett and others were defendants, and in the other C. G. Barrett and Sarah V. Barrett, his wife, were plaintiffs, and John Buford and R. C. Tracewell, trustees, were defendants, which causes had by consent of parties been consolidated and were heard together. The facts which appear in these two records are as follows: Daniel Stone by his will proven in May, 1865, devised jointly to Caleb G. Barrett and his wife, Sarah V. Barrett, the testator's daughter, his home-farm together with one hundred and fifty-six acres of land on the west side of Neal's run in the said county of Wood. On the 16th day of April, 1877, Caleb G. Barrett borrowed of John Buford six hundred dollars at twelve per cent. per annum, and gave his note for the principal and one year's interest, in all six hundred and seventy-two dollars, payable on April 16, 1878. A deed of trust was given on the said home farm, devised to Barrett and wife by her father, to secure the note, in which R. C. Tracewell was trustee. The deed was acknowledged by Barrett and wife on the day on which it bears date, April 16, 1877, but so far as the wife Sarah V. Barrett was concerned, the acknowledgment was fatally defective, in that it did not show, that the deed was fully or indeed in any manner explained to her.

This home-place was advertised for sale by the trustee, R.

C. Tracewell, on July 15, 1878. The sale was adjourned to August 12, 1878. Caleb G. Barrett and Sarah V., his wife, filed their bill and obtained from the judge of the circuit court of Wood county on August 9, 1878, an injunction forbidding the making of said sale. John Buford filed his answer admitting the above facts, but claiming that the loan was made in Belpre, Ohio, where the legal rate of interest was eight per cent. per annum. This answer was replied to generally and also specially, in which they deny, that this loan was made in Ohio. The court on March 17, 1879, pronounced the deed of trust void in so far as it conveyed the interest of Sarah V. Barrett in said home-farm, and perpetuated the injunction in so far as it forbid the sale of her interest in said home-farm to pay said debt. It also purged the debt of the usurious interest, but permitted it to stand for the money loaned and six per cent. interest thereon, and dissolved the injunction in so far as it forbid the sale of the interest of C. G. Barrett in said home-farm, and decreed the costs of the suit against Buford. The trustee, R. C. Tracewell, then again advertised the interest of C. G. Barrett in said home-farm of seventy acres, known as the Daniel Stone farm, and John Buford became the purchaser thereof at eight hundred dollars. R. C. Tracewell, the trustee, made him a deed therefor dated July 7, 1879, which was admitted to record July 12, 1879. In the meantime on the first Monday in August, 1878, Ann R. Tavenner and J. T. Tavenner, her attorney in fact, filed a bill in the circuit court of Wood county, against C. G. Barrett and Sarah V. Barrett, his wife and others, which bill was afterwards amended, and the facts appearing in this cause are as follows: Prior to the giving of this deed of trust to secure this debt to Buford, to-wit, on September 25, 1875, C. G. Barrett and Sarah V. Barrett, his wife, executed to W. W. Van Winkle and B. Mason Ambler, trustees, a deed of trust on this home-farm, the Daniel Stone farm of seventy acres, to secure a bond of two hundred and ninety dollars with interest from September 25, 1875, executed by Caleb G. Barrett and Sarah V. Barrett to the Life Insurance Company of Virginia. This deed was on the day on which it bears date acknowledged for recordation by C. G. Barrett and Sarah V. Barrett, his wife, before W. W.

Van Winkle, one of the trustees acting as a notary public. At any rate the name of the notary public before whom it was acknowledged, and the name of one of the trustees in the deed are identical. Afterwards on January 5, 1876, in a chancery suit in said circuit court, in which Lydia Butcher was plaintiff, and Ann R. Tavenner the widow of Thomas J. Tavenner and his children and heirs-at-law were defendants. J. T. Tavenner was appointed a commissioner to sell a certain tract of land belonging to Thomas J. Tavenner, deceased, in said county of Wood, containing thirty-seven and one half acres. This land was sold on July 15, 1876, and Ann R. Tavenner became the purchaser. This sale was confirmed by the court by a decree made August 17, 1876, and the commissioner, J. T. Tavenner, was ordered to make a deed to the purchaser, Ann R. Tavenner, when she paid all the purchase-money. Ann R. Tavenner then executed to J. T. Tavenner a power of attorney, which was duly recorded to sell the whole or any part of this thirty-seven and one half acres of land for her. And he thereupon on August 27, 1877, sold fifteen acres of this land to Caleb G. Barrett and Sarah V. Barrett, his wife, for six hundred dollars with interest from date. Three bonds of two hundred dollars each were taken for this purchase-money, each bearing date August 27, 1877, and payable to J. T. Tavenner with interest from date in six, twelve and eighteen months. J. T. Tavenner in taking these bonds was known to be acting as the agent and attorney in fact of Ann R. Tavenner. These three bonds were secured by a deed of trust, executed by Caleb G. Barrett and Sarah V. Barrett to C. B. Tavenner, conveying this home-place or Daniel Stone farm of seventy acres. Nine different judgments were also rendered against C. G. Barrett between May 24, 1875, and December, 1877, which were docketed. The principal of these judgments aggregated about four hundred and fifty dollars. On these judgments some payments had been made, but the payments were insufficient to pay off the costs and interest. Some of these judgments were against C. G. Barrett and wife, some against C. G. Barrett alone, and some against C. G. Barrett and a third party.

This being the state of the case Ann R. Tavenner and J.

T. Tavenner, her attorney in fact, filed their bill in the circuit court of Wood county at August rules, 1878, setting out these facts partially, and claiming a lien not only on this fifteen acres sold to C. G. Barrett and wife, but also claiming a lien on this Daniel Stone farm, of about seventy acres, for the payment of said six hundred dollars with interest from August 27, 1877, which was the purchase-money agreed to be paid for this fifteen acres of land, and which was secured to be paid by this deed of trust on the Daniel Stone farm of seventy acres. It set out the previous deeds of trust on this seventy acres in favor of The Life Insurance Company of Virginia and John Buford; said nothing about any difficulty as to either of these deeds of trust having been improperly acknowledged, but admitted their validity and stated, that the decree in favor of The Life Insurance Company of Virginia was a valid and subsisting lien on said home-farm of seventy acres; it named six of the nine judgments against C. G. Barrett, and filed abstracts of them with the bill; it made parties defendants to the suit not only C. G. Barrett and Sarah V. Barrett, his wife, but also the trustees and *cestuis que trust* in said deeds of trust, and said judgment-creditors named in the bill; and it prayed, that the cause might be referred to a commissioner to report all the liens on said tract of fifteen acres, and on said tract of seventy acres, the Daniel Stone farm, and the order of their priority, and that a decree of the sale of said land might be made to pay said liens, and for general relief. An order was made in vacation on August 14, 1878, after notice to parties, referring the cause to a commissioner to report the number, amount and priorities of the liens existing against the real estate of Caleb G. Barrett and Sarah V. Barrett, his wife, and the character of the same, whether by judgment or otherwise, and what real estate these parties were entitled to, and where situated, and any other matter deemed pertinent.

The commissioner made his report on the 29th of August, 1878. He reported as liens on the home-farm, or the Daniel Stone farm of seventy acres, the three deeds of trust, hereinbefore named, executed by C. G. Barrett and eight of the nine judgments against C. G. Barrett or C. G. Barrett and wife, or C. G. Barrett and another, stating the dates of the

judgments, the amount still due on them, against whom they were rendered, and when they were docketed, but omitted judgments named in the bill of *J. N. Murdoch v. C. G. Barrett and Sarah V. Barrett* for thirty-seven dollars and sixty-seven cents with interest from April 1, 1876, and the further sum of two dollars and ten cents, costs recovered before John Cook, a justice of the peace of Wood county on April 3, 1876, and duly docketed April 5, 1876. No reason is given for omitting it. I presume it was omitted, because it had been satisfied. He included in his report three other judgments not named in the bill. He also reported, that C. G. Barrett and wife owned only the lands named in the bill.

On October 17, 1878, C. G. Barrett demurred to the bill and the court sustained his demurrer, but granted leave to the plaintiff, Ann R. Tavenner, to amend her bill and make new parties; and the cause was remanded to rules, and the suit was ordered to abate as to J. T. Tavenner, attorney in fact, and to proceed in the name of Ann R. Tavenner, plaintiff. She filed an amended bill, in which she made defendants C. G. Barrett and Sarah V. Barrett, his wife, the trustees and *cestuis que trust* in said three deeds of trust, all the judgment-creditors named in the former bill or in the commissioner's report, as well as the defendants with C. G. Barrett in such judgments, and also J. T. Tavenner individually, and as commissioner of the court. It set out in detail all the facts which we have stated, and all the proceedings up to that time in said cause, except that it failed to call any attention to the defective execution of the deed of trust to R. C. Tracewell, trustee, for John Buford, or to the fact that the deed of trust executed to Van Winkle and Ambler as trustees, for The Life Insurance Company of Virginia was acknowledged before said Van Winkle as a notary public, and admitted to record only on this acknowledgment. But on the contrary, it spoke of the debt secured by this deed of trust as a lien then existing, and unsatisfied. It claimed, that the debt of the plaintiff, Ann R. Tavenner, of six hundred dollars with interest from August 27, 1877, was a lien on both the fifteen acre tract, for which this six hundred dollars was the purchase-money, and also on the home-farm, or Daniel Stone farm of seventy acres. The bill prayed, that

all these defendants should be required to answer this amended bill on oath, and that said report of the commissioner if proper and regular might be confirmed, or if necessary, that the same might be recommitted to a commissioner to ascertain and report all liens of any and every kind whatever existing against said lands, and the order of their priority, and that the court would decree a sale of said land to pay off all said liens, and for general relief. There are filed with this bill as escrows, to be delivered when the purchase-money is paid, a deed from the special commissioner, J. T. Tavenner, to Ann R. Tavenner for the thirty-seven and one half acres of land, and a deed from J. T. Tavenner, commissioner, and Ann R. Tavenner to C. G. Barrett and his wife, S. V. Barrett, for the fifteen acres being a part of said thirty-seven and one half acres sold to them. C. G. Barrett and wife filed a demurrer to the amended bill, in which no less than twenty-three causes of demurrer were assigned. This demurrer was overruled by the court. It will be noticed so far as is necessary in the opinion to be pronounced in this case.

The commissioner in his report before referred to states, that he reports that the plaintiffs claim and ask to be reported: First, that the deed of trust given by C. G. Barrett and S. V. Barrett to W. W. Van Winkle and B. M. Ambler, trustees, referred to as the first lien in this report is invalid for the reason, that the acknowledgment thereto was taken by one of the trustees, W. W. Van Winkle, a party to said deed, and a party in interest. Second, the deed of trust given by C. G. Barrett and S. V. Barrett, his wife, to R. C. Tracewell, trustee, to secure John Buford is invalid so far as it affects the interest of said S. V. Barrett for the reason, that there is no proper certificate of acknowledgment thereto as to her. Third, the judgment of *E. Clark v. C. G. Barrett and S. V. Barrett* is illegal because it is improper in law to render judgment against a married woman, a court of law having no jurisdiction, and a judgment so rendered does not bind her, and is not a lien on her real estate. The commissioner then reports what will be the order of these liens if these objections are well taken, which are submitted to the court. Though thus specifically noticed in this report no

notice of these objections to these liens is taken in the amended bill filed afterwards.

J. T. Tavenner filed an answer to this amended bill admitting the facts stated in the amended bill. The Life Insurance Company of Virginia, W. W. Van Winkle and B. M. Ambler filed joint and several answers. They assert, that the plaintiff, Ann R. Tavenner, through her agent J. T. Tavenner had full knowledge and notice of the existence of this deed of trust before any deed of trust was executed in favor of said J. T. Tavenner or Ann R. Tavenner by said Barrett and wife. C. G. Barrett and S. V. Barrett, his wife, filed joint and several answers. They deny on information and belief, that any part of these thirty-seven and one half acres sold in this suit against the heirs of Thos. J. Tavenner ever belonged to him, and therefore the plaintiff, Ann R. Tavenner, obtained no title to these thirty-seven and one half acres by her purchase and its confirmation by the court, and that she can not make a good title to them for the fifteen acres of land, a part of which she sold, and if the purchase-money was paid by the respondents it would be totally lost to them. And they also allege, that she has paid no part of the purchase-money of said thirty-seven and one half acres of land.

She says, that she signed the purchase-money bonds for these fifteen acres of land merely as the security of her husband, and that her separate estate is not bound for it. She claims a moiety of the home-place, the Daniel Stone farm of seventy acres, as her separate estate under her father's will. She also claims, that in executing the deed of trust in said home-farm to secure this six hundred dollars, the purchase-money of these fifteen acres of land, she did not convey her separate estate, but only surrendered her dower in her husband's moiety of said home-farm. She further claims, that both the other deeds of trust, the one to secure the Life Insurance Company of Virginia, and the other to secure John Buford, are invalid on account of the defect in the acknowledgment of them, which have been before pointed out, and especially, that the acknowledgement before W. W. Van Winkle, the trustee in the first deed of trust, was an illegal and void acknowledgement. She asserts, that the debt due Buford has been fully discharged.

C. G. Barrett admits the execution of and produces the paper, which was signed by J. T. Tavenner as commissioner and as agent of Ann R. Tavenner, which states, that these fifteen acres of land were sold to C. G. Barrett and his wife jointly, and in which he agreed to convey it to them, when the purchase-money should be paid. But Barrett asserts, that his wife never knew of the existence of this paper, till after this suit was brought. He claims, that he is entitled to have a good title to these fifteen acres of land, before he can be required to pay the purchase-money; that when he bought it, he believed he could get a good title for it; but this, he says, he is now advised, that he cannot do. He also claims, that his wife's separate estate cannot be bound for this purchase-money. He asks, that Ann R. Tavenner be required to answer and show the character of her title, that it may be enquired into by a commissioner, and if no good title can be made, that his contract for the purchase of these fifteen acres of land be annulled and his bonds surrendered. Sarah V. Barrett asks, that the home-place of seventy acres be partitioned between herself and her husband, and that only his portion of it be sold to pay the liens upon his interest in said lands; and if it should be shown, that Ann R. Tavenner can make a good title to these fifteen acres of land, that she be required to convey it with general warranty of title. These answers except that of the Life Insurance Company of Virginia, and of the trustees Ambler and Van Winkle, were all sworn to, and all of them were replied to generally.

After the sale on the 7th day of July, 1879, by the trustee, R. C. Tracewell to John Buford of the interest of C. G. Barrett in this Daniel Stone farm of seventy acres, it being one moiety thereof, for eight hundred dollars and its conveyance, Caleb G. Barrett and Sarah V. his wife, filed a bill in the circuit court of Wood county asking, that said sale might be set aside for various reasons alleged in the bill, but unsustained by any proof. The trustee, R. C. Tracewell, answered this bill stating, that he had sold this interest of C. G. Barrett in said farm at public auction to the highest bidder, and that John Buford was the purchaser at eight hundred dollars. As the land was sold under a deed of trust in favor of said Buford the trustee says, he only required the purchaser to

pay the costs of suit, the expenses of the sale, and the amount of the liens on said interest of C. G. Barrett prior to the deed of trust in favor of Buford. This amounted in all to five hundred and eleven dollars and sixty-two cents, and after paying the costs of the suit and sale there remained in his hands, this trustee, Tracewell, says, four hundred and seventy-nine dollars and sixty-two cents to be paid out as the court might direct. This answer was sworn to.

These two suits having been by consent consolidated and heard together, the court on October 18, 1879, overruled the exceptions to the report of the commissioner in the case of *Ann R. Tavenner v. C. G. Barrett et als.*, which exceptions have been lost out of the papers, and confirmed said report in all respects so far as the same applies to the liens upon the real estate of C. G. Barrett, their amounts and priorities, and did adjudge, order and decree, that Ann R. Tavenner do recover from C. G. Barrett and S. V. Barrett the sum of six hundred dollars with interest thereon, from the 27th of August, 1877, until paid; and the court was of opinion, that the said unpaid purchase-money constituted a first lien on the said tract of fifteen acres, and did order that unless the same was paid to Ann R. Tavenner together with the costs of her said suit within thirty days from the rising of the court, then a special commissioner named, after a specified advertisement should sell such tract of fifteen acres on certain specified terms. But before executing this order said commissioner was required to give a bond in the penalty of one thousand two hundred dollars conditioned according to law.

Upon the questions and objections in said report submitted to the court for its decision, the court did adjudge, order and decree, that the deed of trust given by C. G. Barrett and S. V. Barrett to W. W. Van Winkle and B. M. Ambler, trustees, to secure the Life Insurance Company of Virginia, described in the papers in these causes, bearing date and duly admitted to record on the 25th day of September, 1875, is invalid, null and void, and of no effect whatever. It also decided, that the deed of trust given by C. G. Barrett and S. V. Barrett to R. C. Tracewell, trustee, to secure John Buford described in the papers of these causes, bearing date and duly admitted to record on the 16th day of April, 1877,

is invalid, null and void as to the interest of S. V. Barrett thereby intended to be encumbered. And it appearing to the court, that the trustee, R. C. Tracewell, has sold the undivided interest of C. G. Barrett in the said tract of seventy acres, and that the proceeds arising from said sale after paying the costs attending the same, and the costs of the second named of said suits amount to seven hundred and sixty-eight dollars, the said trustee was ordered to pay the same in satisfaction of a judgment and deed of trust-lien in favor of the plaintiff C. G. Barrett in the order of their priority, as settled in said report of said commissioner. The court reserving for the present its decision as to the liens on the interest of S. V. Barrett in the seventy acre tract described in her papers in this cause. From this decree The Life Insurance Company of Virginia, Caleb G. Barrett and Sarah V. Barrett have each obtained an appeal and *super-sedeas*.

Van Winkle & Ambler for the Life Insurance Company cited the following authorities: 12 W. Va. 313; 2 Kelly's Stat. ch. 153 §§ 35, 36; Code ch. 125 §§ 35, 36; 7 W. Va. 476; *Snyder v. Martin*, 16 W. Va.; 1 Dan. Chy. Pr. 191-581; 1 H. & M. 470; 4 Russ. 224; 11 Rep. 153; 1 Dan. Chy. Pr. 404; Story Eq. Pl. §§ 509, 510, 541; Metf. Tyl. Eq. 418, note; Adams Eq. 299 *et seq.*; Dan. Chy. Pr. (1879) 425, 426, note 6; 17 How. 130; 32 Gratt. 170; *Id.* 185; 26 Gratt. 207; 13 Gratt. 383; 11 W. Va. 342; *Worthington v. Staunton*, 16 W. Va.; 14 W. Va. 738; 23 Gratt. 383; Story Eq. Pl. 257 and notes; 1 Dan. Chy. Pr. 335-385; 14 W. Va. 273; 10 W. Va. 321; 11 W. Va. 217; *Burlew v. Quarrier*, 16 W. Va.; 9 W. Va. 552; Code p. 448 and notes; *Greenburo v. Evans*, 15 Gratt.; 2 Leigh 425; *Id.* 84; 2 Min. Inst. 847; 11 Leigh 294; 5 Gratt. 233; Gil. 235; 4 Gratt. 73; 14 Bkpt. Reg. 513; 18 Gratt. 387; 19 Gratt. 592; *Id.* 720; 21 Wall. 185; 4 Greenl. Ev. § 333; 26 Gratt. 124; Code p. 629 § 5; 1 Dan. Chy. Pr. 197, 198; Code ch. 76 §§ 1, 2; 2 Min. Inst. 222; *Id.* 286 and cases cited; 1 Lom. Dig. 424, 425; 8 Gratt. 260; 9 W. Va. 469; 14 Gratt. 102; 6 Leigh 269; 2 Min. Inst. 779 and cases cited.

L. N. Tavenner and Walter S. Sands for appellees cited the

following authorities: Proff. Not. p. 33 § 35 and cases cited; 38 Tex. 645; 46 Mo. 404; 20 Ia. 231; 13 Mich. 329; 20 Me. 413; 13 W. Va. 659; Code ch. 125 § 36; Kelly's Stat. ch. 153 p. 885; 7 W. Va. 390.

GREEN, JUDGE, announced the opinion of the Court :

The appeal before us is from a decree in two causes, which by consent of parties were consolidated and heard together. We will first consider so much of the decree of October 10, 1879, which was appealed from and which was based in part on the proceedings in the second of these cases heard together and consolidated by consent. This was the cause of C. G. Barrett and wife against John Buford and R. C. Tracewell, trustee. It is obvious, that the circuit court did not err in awarding the injunction to the sale of the Daniel Stone farm of seventy acres, which had been advertised by the trustee, R. C. Tracewell, under the deed of trust dated April 16, 1877, for the benefit of John Buford. Nor did it err in the decree in that cause made on March 17, 1879, when it declared, that this deed of trust from C. G. Barrett and wife to R. C. Tracewell, trustee, was not the act and deed of Sarah V. Barrett, the wife, but was the deed of C. G. Barrett, the husband. This was obviously a correct conclusion. The certificate on which this deed of trust was admitted to record was as follows:

"STATE OF WEST VIRGINIA, WOOD COUNTY, ss.:

"Before me, the undersigned, a justice of the peace in and for said county and State, personally came C. G. Barrett and Sarah V. Barrett, his wife, and acknowledged the execution of the foregoing and annexed deed, bearing date April 16, 1877. And I further certify that I examined, separate and apart from her said husband, Sarah V. Barrett, and she acknowledged that she had voluntarily signed the foregoing deed, and that she did not wish to retract the same.

"In witness whereof I have hereunto set my hand and seal.

"J. P. TRACEWELL, J. W. C. [SEAL.]"

The certificate was sufficient so far as C. G. Barrett, the husband, was concerned. But it was obviously fatally defective so far as it purported to be a privy examination and certificate, of acknowledgment of this deed of trust on the part

of Sarah V. Barrett, the wife. It does not appear from this certificate, that the wife had this deed of trust fully explained to her, or indeed that it was explained to her at all. This is a fatal defect, and renders the deed void as to her. See *Watson v. Michael and Ice, supra*, p. 568.

The circuit court therefore properly decided, that the injunction theretofore awarded in this cause be perpetuated as to the rights, interest and estate of said Sarah V. Barrett in said Daniel Stone farm of seventy acres, and that this deed was properly declared void by the court in said decree, so far as it purported to convey her said interest in said farm. The court also in said decree properly purged the debt secured by said deed of trust of the usurious interest contained in it, the real debt being only six hundred dollars with interest at the rate of six per cent per annum from April 16, 1877: there being no proof in this cause that said loan was a contract made in Ohio. And the said deed of trust was a valid security so far as it conveyed the moiety of said Daniel Stone farm of seventy acres, which belonged to Caleb G. Barrett her husband. The court in said decree properly adjudged, that said injunction to the sale thereof, which had been granted so far as the rights and interest of Caleb G. Barrett in said trust were concerned, being one half thereof, be dissolved except as to said usurious interest, of which the debt had been purged, and it properly decreed, that the defendant, John Buford, do pay unto said Sarah V. Barrett her costs about her suit in this behalf expended. This was obviously a final decree in this cause, and completely ended every controversy in this cause.

After this cause was thus ended, the trustee, R. C. Tracewell, sold under the provisions of this deed of trust, the interest of Caleb G. Barrett, it being a half interest in and to this Daniel Stone farm of about seventy acres, for the sum of eight hundred dollars cash to John Buford, and made him a deed therefor dated July 7, 1879, which was duly recorded July 12, 1879. Thereupon Caleb G. Barrett and Sarah V. Barrett brought another suit against R. C. Tracewell, trustee, and John Buford, the purchaser, in the circuit court of Wood county asking, that this sale might be set aside and this deed canceled, and that John Buford might be enjoined

from selling or conveying this land or any part thereof, and that the said trustee, R. C. Tracewell, might be enjoined from paying out any of the purchase-money of said land; and asking further, that this cause be consolidated with that of Ann R. Tavenner and C. G. Barrett and others pending in said court. The injunction was awarded as prayed for.

The answer of R. C. Tracewell, the trustee, to this bill under oath denies the allegations of the bill and says, that this interest of Caleb G. Barrett was sold pursuant to the provisions of the deed of trust. There being no proof offered of the allegations in the bill, this bill in the decree of October 18, 1879, should have been dismissed, the injunction in this cause being first dissolved, and the plaintiffs, C. G. Barrett and Sarah V. Barrett, should have been decreed to pay to the defendants their costs expended in said second suit against them. But instead of doing this, the court by this decree of October 18, 1879, directed the proceeds arising from said sale, after the payment of the costs of the proceeding in the cause of *C. G. Barrett and wife v. R. C. Tracewell and John Buford*, and the costs of the sale, to be paid out in satisfaction of the judgments and other liens on the interest of said Caleb G. Barrett in the said Daniel Stone farm of seventy acres, in the order settled by the report of the commissioner in said cause of *Ann R. Tavenner v. C. G. Barrett et als.*, which was confirmed. This seems to me to be an obvious error in the circuit court.

The first suit of *C. G. Barrett and wife v. R. C. Tracewell, trustee, and John Buford* had been finally ended by this decree of March 17, 1879, and John Buford by this decree had been properly required to pay the costs of this suit. Yet in this decree of October 18, 1879, the court authorizes in effect, that the trustee, R. C. Tracewell, shall pay the costs of this suit out of the funds arising from the sale of Caleb G. Barrett's interest in said Daniel Stone farm. Thus really making Caleb G. Barrett pay all the costs of this first suit, in which he had succeeded, and whose costs had been decreed to be paid by said Buford. Again it was an obvious error for the court in this decree of October 18, 1879, which was appealed from to order, that any portion of the purchase-money arising from the sale of said Caleb G. Barrett's interest in said

Daniel Stone farm, which was in the hands of the trustee R. C. Tracewell, should be applied to any of the judgments or prior liens against the land, or interest of said C. G. Barrett in said Daniel Stone farm. The whole of this fund in the hands of the said trustee, R. C. Tracewell, after the payment of the expenses of the sale, should have been applied to the payment of the debt due John Buford, secured by the deed of trust, after having first purged such debt as the court had done of the usurious interest. John Buford at this sale of the interest of Caleb G. Barrett in this Daniel Stone farm of seventy acres, had bought this interest at eight hundred dollars. What was the interest he so purchased? Obviously it was the interest of Caleb G. Barrett conveyed by his deed of trust of April 16, 1877, which was one undivided moiety of the said Daniel Stone farm of seventy acres, subject to all judgments, which had been rendered against him to April 16, 1877, and which had been docketed, as well as all other liens shown by the record to be on the said interest of said Caleb G. Barrett in said Daniel Stone farm by deed of trust or otherwise. The interest of Caleb G. Barrett in the said Daniel Stone farm of seventy acres, in the hands of John Buford the purchaser, ought to be subjected by sale to the payment of all the docketed judgments and other liens, which were upon it on April 16, 1877, and which remain unsatisfied; and this should yet be done in the further progress of the case of *Ann R. Tavenner v. C. G. Barrett and others*, when the same is remanded to the circuit court of Wood county, as it must be for further proceedings. There was really no propriety in consolidating this cause with the cause of *C. G. Barrett and others v. Tracewell, trustee, and John Buford*. This last named cause was ready for a final decree, simply dissolving the injunction, which had been awarded, and dismissing the bill at the cost of the plaintiff. Orders to consolidate causes in equity should rarely if ever be made. See opinion of Judge Carr in *Claiborne v. Gross et al.* and *Wimbish v. same*, 7 Leigh p. 339. Where it is proper chancery causes should be heard together, but ought not except perhaps in a few special cases to be consolidated.

We will now examine the decree of October 18, 1879, which was appealed from to ascertain, whether any portions

of it based upon the proceedings in the case of *Ann R. Tavenner v. C. G. Barrett and others* are erroneous. But before doing so we will consider the proceedings in this cause prior to said decree, and determine, whether any of them are erroneous. The bill was originally filed by Ann R. Tavenner and J. T. Tavenner, her attorney in fact, against Sarah V. Barrett and others. We will for the present assume, that the facts set out in this bill showed a case, in which a court of equity ought to have granted relief, if the suit had been brought by Ann R. Tavenner alone, and if J. T. Tavenner, her attorney in fact, had not been joined with her as a co-plaintiff. The circuit court was of opinion, that this joining of J. T. Tavenner, her attorney in fact, as a co-plaintiff with her of itself rendered the bill liable to demurrer; and accordingly by its decree of October 17, 1878, sustained a demurrer to this bill, but gave leave for the plaintiff, Ann R. Tavenner, to file an amended bill, and ordered the suit to abate as to the plaintiff J. T. Tavenner, attorney in fact, and to proceed in the name of Ann R. Tavenner.

It is unquestionably true, that a person who is a mere agent in a transaction ought not to be made a party to a bill, as for instance an auctioneer, who has sold an estate the sale being the matter of controversy. See *Long v. Colman*, 10 Beav. 370; *White v. White*, 5 Gill. 359. So an agent for the purchase of land is not a proper party to a bill against the principal for a specific performance, although the agent signed the memorandum for the purchase in his own name. See *Jones v. Host*, 1 H. & M. 470; *Kingley v. Young*, Coop. Eq. Pl. 42. And it is a good ground of demurrer to the whole bill, that a person, who has no interest in a suit and has no equity against the defendant, is improperly joined as a plaintiff. See *Clarkeson v. De Speyster*, 3 Paige 336; *Little v. Buie*, 5 Jones Eq. (N. C.) 10; *King v. Galloway*, 5 Jones Eq. (N. C.) 128; *Wright v. Santa Clara Mining Association of Baltimore*, 12 Md. 443; *Westfall v. Scott*, 20 Ga. 233. But on the other hand there is a class of persons called generally agents, who are nevertheless properly parties to a suit in equity brought by the principal. The agents to which I refer are trustees. The general rule in such cases is, that trustees as well as the *cestuis que trust* are necessary parties in

suits in equity. And as a general rule the trustee, who has the legal title must be made a party. The reason for this rule is, that he holds the legal title and should therefore be made a party, though he has no beneficial interest in the subject of controversy; and this rule applies, whenever the legal right to sue for the thing demanded is in a different party from the one claiming the beneficial interest. The one thus holding the legal right to sue is so far as this rule goes in such case regarded as a trustee, who should be made a party. Thus when a bill is filed for the specific performance of a covenant under the hand and seal of one for the benefit of another, the covenantee though he has no beneficial interest, must be a party to a bill brought by the person for whose benefit the covenant was made against the covenantor. See *Cooke v. Cooke*, 2 Vern. 36; *Cope v. Parry*, 2 Jac. & W. 538. So in *Miller v. Whittaker*, 23 Ill. 453, Miller acting as an agent for Flinchburgh sold a certain patent to Whittaker, and as the consideration thereof he gave him certain notes payable to Miller personally, and made to him deeds for certain lands conveying the lands to Miller personally. In a suit in equity brought by Miller to set aside these deeds and contract as fraudulently procured by Miller, it was held, that Flinchburgh the principal was a necessary party. There was not even a suggestion, that the agent, Miller, who was necessarily regarded as a trustee for Flinchburgh was not a proper party to such a suit. The distinction seems to be, that when there is a personal covenant under hand and seal, or a personal conveyance by deed to the agent, which is really intended for the benefit of the principal, though he be not named in the covenant or deed, yet as in such case the agent is a real trustee for the principal, in a suit involving the enforcement of such covenant or deed, or for the annulling of either, the agent or trustee as well as the principal or *cestui que trust* must in effect both be made parties.

But the same rule does not apply to agreements not under seal, where the one party is merely the agent of another, and makes the agreement as such, though in his own name. In such case it is not necessary in suing to enforce such agreements not under seal or to set them aside in equity to bring the agent before the court, for either in law or in equity the

principle may in such case interpose and supersede the right of the agent, and claim to have the contract performed to himself, although made in the name of the agent. See *Crocker v. Higgins*, 7 Conn. 342; *Duke of Norfolk v. Worthy*, 1 Camp. N. P. 337; *Bethune v. Fairbrother*, cited in 5 M. & S. 385.

Applying these principles to the case before us it would seem, that J. T. Tavenner was not only a proper but a necessary party to the bill in this cause. One of its main objects was to enforce a deed of trust, dated August 27, 1877, executed by the defendants Caleb G. Barrett and Sarah V. Barrett, his wife, to C. B. Tavenner, trustee, to secure three bonds of two hundred dollars each with interest from date, which were made payable to J. T. Tavenner individually, but which it was alleged were given for land of the plaintiff, Ann R. Tavenner, sold by J. T. Tavenner her attorney in fact to Caleb G. Barrett and Sarah V. Barrett, his wife. The legal title to these three bonds was in J. T. Tavenner, but he was a mere trustee holding the legal title to these three bonds for the use of Ann R. Tavenner, and in a suit in equity to enforce them it was necessary on the principles, which we have laid down, that both she, the *cestui que trust*, and he, the trustee, should be parties to such suit. J. T. Tavenner, the trustee, holding the legal title of these bonds, and being a necessary party to a suit in equity to enforce their collection brought by the beneficial owner of these bonds, Ann R. Tavenner, and there being no controversy between them, but he admitting that he had these bonds executed to him really for the use of Ann R. Tavenner, it would follow as of course, that she could make him a defendant in said suit; or he as such trustee might properly unite with her as co-plaintiff, just as the assignor of a bond in a suit in equity brought to enforce it by the assignee, may be made a defendant; or the assignee and assignor of the bond, if there be no controversy between them, may properly unite as co-plaintiffs in a suit in equity to enforce the collection of such bond. In *Nelthorpe v. Holgate*, 1 Collyer R. 218 the vice chancellor says, in a suit in which Sir John Melthorpe and Mr. Holmes were co-plaintiffs, and Mr. Holgate and others were defendants: "There is not nor ever has been any dispute or ques-

tion between Sir John Melthorpe and Mr. Holmes. If then one of the plaintiffs in the original suit was a proper and a necessary plaintiff, and there was no conflict of interest between them, and each was concerned and interested in the subject of the suit, how could it be improper that they should be co-plaintiffs? The ordinary rule against making an agent a party has nothing in common with a case such as this."

My conclusion therefore is, that the circuit court of Wood county erred in its decree of October 17, 1878, in sustaining the demurrer to the original bill, because J. T. Tavenner was not made a party plaintiff in the cause with Ann R. Tavenner. It is true, that he is called in the bill her attorney in fact, but the bill on its face shows, that he was the trustee and holder of the legal title of the three bonds of two hundred dollars each, payable to him as obligee, and that he held them as such trustee for the co-plaintiff, Ann R. Tavenner. But this error was of course not prejudicial to the defendants, the appellants in this Court, and it was really corrected by granting leave to Ann R. Tavenner to amend her bill and make J. T. Tavenner a defendant. This was perhaps his appropriate position, at least it was clearly a legitimate position for him to hold, he being as we have seen, a necessary party to the suit.

The amended bill, which was filed was an improvement on the original bill. It set out the case of the plaintiff more clearly and more fully, and made certain other parties defendants, which the commissioner's report showed were proper parties defendants to the cause. But it was obviously a suit for substantially the same purposes and based on substantially the same facts, and asking substantially for the same relief as the original bill, and was clearly a proper amended bill and not any new suit as has been claimed by the appellant's counsel. This amended bill was demurred to by Barrett and wife, who assigned no less than twenty-three grounds of demurrer. But it seems to me clear, that this amended bill alleged facts, which if true, clearly showed, that the plaintiff had a right to the equitable relief against Barrett and wife which it sought. So far as they were concerned the substance of the bill was, that in a certain chancery cause pending in that court, the court had decreed the sale of thirty-

seven and one half acres of land, which the plaintiff bought and the sale had been confirmed by the court, thus vesting in the plaintiff the equitable title to this thirty-seven and one half acres of land; that she, by her attorney in fact, then sold fifteen acres of this land to Barrett and wife for six hundred dollars, for which they gave their bonds payable to the person, who as her attorney in fact had sold this land to them; that thereupon they secured the payment of the purchase-money by executing a deed of trust on a tract of seventy acres of land owned by them, which deed of trust was duly acknowledged by both Barrett and his wife and recorded. The person to whom these bonds were payable, and whom Barrett and wife knew was acting as the agent of the plaintiff, was also the commissioner of the court, who had sold this land to the plaintiff, and he was by the order of the court to make a deed for it, when the purchase-money was all paid; and his contract with Barrett and wife was, that he would make them a deed for these fifteen acres of land when the purchase-money was all paid. Barrett and wife had paid no part of this six hundred dollars, which by their bonds they had agreed to pay, and which they had secured by a deed of trust on the seventy acres of land, which they owned jointly. No deed had been made to them for the fifteen acres of land, which they had bought, and none was to be made to them till all the purchase-money was paid. I cannot see why the plaintiff had not a right in a court of equity to enforce the payment of this purchase-money for these fifteen acres of land by asking its sale, as no deed had been made to Barrett and wife for it.

This equity is constantly enforced in a court of equity, and land sold to pay the purchase-money by order of the court, where no deed had been made to the purchaser. Nor do I see any difficulty in the court's directing the sale of the seventy acres of land to pay the six hundred dollars, which were by the deed of Barrett and wife secured upon it, though the bonds were payable to C. B. Tavenner, they being really for the use of the plaintiff, and in point of fact given for land sold by her to Barrett and wife. Nor am I able to see, that the payment of these bonds can not be enforced because the plaintiff did not sign any memorandum in writing showing,

that she had sold these fifteen acres of land for these bonds. Barrett and wife had signed not only these bonds, but also the deed of trust to secure them. The statute of frauds only requires, that the agreement sought to be enforced should be signed by the parties to be charged therewith, and it need not be signed by the other party. I am unable to see, that any fraud was committed by the commissioner of sale, J. T. Tavenner, in making this arrangement with Barrett and wife. In the suit, in which he was acting as commissioner, the parties to the suit could only be interested in the payment of the purchase-money of this land sold. It was immaterial whether this payment was made by the original purchaser, the plaintiff, or by these sub-purchasers. Such changes of the parties to whom the court's commissioner is to make the deed is of constant occurrence, and I have never supposed, that there was any impropriety in it much less any fraud.

The fact, that the bonds for the purchase-money were given to J. T. Tavenner instead of being given to the plaintiff, Ann R. Tavenner, to whom they should have been given, should not embarrass a court of equity, who never regard form, but always look to substance, in enforcing the payment of this purchase-money. C. B. Barrett's wife, Sarah V. Barrett, is unquestionably bound by the bonds, which she executed, and by the deed of trust which she gave on her separate property, and in which her husband united. She would have been so bound though she had been her husband's security merely, which she was not. There is in this State no sort of necessity in order to bind her separate estates, that these bonds should so state on their face. If given for a valuable consideration, as they were, they bound her separate estate. See *Radford et al. v. Carwile*, 13 W. Va. p. 572. It is obviously immaterial, whether the plaintiff when she sold this land to Barrett and wife had only an equitable or a legal title thereto; in either case the purchase is binding on the purchasers. These views are really a sufficient answer to all of the twenty-three grounds of demurrer assigned to this bill, except those which are based on the idea, that the plaintiff was bound to tender with her bill to Barrett and wife a deed for these fifteen acres of land with general warranty of title.

The contract set out in the amended bill is stated to have been made by Barrett and wife with J. T. Tavenner, who, by a regular power of attorney, executed by the plaintiff and duly recorded was authorized to sell said land for the plaintiff; and this contract was, that in consideration of six hundred dollars with interest from the date of the contract April 17, 1877, to be paid in six, twelve and eighteen months, secured by the bonds of the purchasers, and a deed of trust on seventy acres of land belonging to them jointly. Plaintiff sold to said Barrett and wife a portion of said land which she had bought of J. T. Tavenner, commissioner of this Court but, for which she had no deed, though the sale had been confirmed by the circuit court. The portion sold contained fifteen acres, and is described by metes and bounds in the amended bill; and the bill states, that no part of this purchase-money has been paid, and tenders a deed executed by the said J. T. Tavenner, special commissioner in said case, and by Ann R. Tavenner and J. T. Tavenner, her attorney in fact, which deed contained a special warranty of title, and the bill states is offered as an escrow to be delivered to the purchasers on the payment by them of the purchase-money.

Now as I understand the law it was not necessary, that any deed should have been tendered to the purchasers of this land either before the institution of this suit, as the appellee's counsel insists, or with the bill. All that was necessary, according to the terms of the contract stated in the bill, was for the plaintiff to make a deed in accordance with her contract, when the purchasers Barrett and wife paid the purchase-money. If the bill had shown on its face, that she never could have made such a deed as the contract called for, as for instance if the bill had been filed by an assignee in bankruptcy and the contract showed, that the bankrupt had bound himself to insert in the deed certain covenants, such contract could not be specifically enforced unless the assignee in bankruptcy was willing to give such covenants personally. But so liberal is the court of equity in such a case, that though the bankrupt was unable or not obliged to execute such covenants as he had agreed to do, yet the court at the instance of the assignee of such bankrupt would enforce such contract specifically, if the assignee himself would

agree to execute such contract in lieu of the bankrupt. See *Powell v. Lloyd*, 2 Y. & J. 371.

To justify the court in sustaining a demurrer to a bill for specific performance, the ground of demurrer must be a short point, upon which it is clear that the bill will be dismissed with costs at the hearing. If the evidence to be taken is such as may sustain the relief asked with some modifications the demurrer ought to be overruled, and the case should stand until the hearing to be then disposed of on its merits. See *Brooke v. Hewitt*, 3 Ves. jr., 253. It is not necessary, that the bill for a specific performance brought by a vendor should show, that he had a valid legal title to the land sold; on the contrary the bill could not be demurred to though it appeared on the face of the bill, that he not only did not have a good legal title to the land, but that he did not have to a portion of the land any title legal or equitable, and that he never could acquire a good title thereto, provided it appeared, that the portion to which he could never acquire a good legal title was an insignificant portion of the land sold. In such cases, the court often decrees specific performance on the application of the vendor or his making compensation for the insignificant portion of the land, which he agreed to sell and to which he had not and could not acquire a title.

Generally in such cases time is not considered of the essence of the contract; and accordingly it is not generally regarded as material, whether the title of the plaintiff was a good title, when he made the contract of sale or when he brought his bill for a specific performance, and he is permitted by the court to make out his title at any time before the report on his title, and if he can do so though his title was imperfect when the bill was filed, he will be entitled to a decree for a specific performance. See *Bennet College v. Carey*, 3 Bro. C. C. 390. The court accordingly often allows time for the completion of his title by the vendor, and has more than once allowed the vendor time to get an act of Parliament to make good his title. *Lord Stourton v. Meers*, cited 2 P. Wms. 630; *Lord Braybrooke v. Inskip*, 8 Ves. 417-436; *Coffin v. Cooper*, 14 Ves. 205. And when upon the face of the contract there was difficulty in the plaintiff's title, Vice

Chancellor Wood refused on demurrer to stop a suit for specific performance on the ground, that the act of Parliament contemplated had not been obtained. *Devenish v. Brown*, 26 L. J. ch. 23. The courts grant indulgence in point of time for getting over any difficulties in matters of conveyance, as much when the vendor is plaintiff as when the suit is instituted by the purchaser. *Duke of Beaufort v. Glynn*, 2 Sm. & G. 213.

These cases are ample to show, that there is no necessity in a suit for specific performance brought by a vendor for him to tender a good deed or any deed in with his bill in order to make it good on demurrer. And therefore even if in this case he was bound to make a general warranty deed, his tendering a special warranty deed would not have made his bill bad on demurrer; but at the hearing the court would require him before receiving the purchase-money to execute a deed with general warranty, which the plaintiff could of course do. In this case the answers of the defendants, Barrett and wife show, that they were entitled by the contract to a deed with only special warranty. The undisputed law is, that as a general rule upon an agreement for the sale of land the vendor, though nothing be said in the contract on the subject, is considered as contracting for a general warranty. See *Rucher v. Lowther*, 6 Leigh 259. The law is thus stated in 2 Th. Coke Lit. 325 n. (G. 3): "With respect to the persons who are bound to enter into these covenants it may be observed in general, that all persons who convey lands whereof they are seized to their own use, are bound to enter into the usual covenants for the title of the land conveyed. But where the estate is sold by trustees under a will, a purchaser is not entitled to covenants for the title. And the same rule applies where an estate is sold under an order of a court of equity. See *Wakeman v. The Dutchess of Rutland*, 3 Ves. jr. 505, 506. In both cases the purchaser is entitled to a covenant from the vendors, that they have done no act to encumber the estate, a special warranty substantially."

The contract of sale in this case filed with the answers of C. G. Barrett and Sarah V. Barrett, his wife, is as follows: "This is to show, that I have this day sold C. G. Barrett and Sarah V. Barrett, his wife, the following described piece of

land, (its boundaries are then set out at length, and the agreement proceeds thus), containing fifteen acres more or less for the sum of six hundred dollars. I have received the notes of said Barrett and wife at six, twelve and eighteen months for the sum of two hundred dollars each with interest, and upon payment of the sum in full I agree to make to C. G. Barrett and S. V. Barrett a deed for the above mentioned tract of land August 27, 1877." Signed "J. T. Tavenner commissioner and agent for A. R. Tavenner." Now when we remember, that Ann R. Tavenner had purchased this land of J. T. Tavenner as the commissioner of the circuit court of Wood county in a certain chancery suit, and that this sale had been confirmed, but no deed, had been made to her by J. T. Tavenner, the special commissioner, but she by a power of attorney had authorized him to sell it for her, it seems to me clear, that the understanding of the parties as shown by this written contract was, that J. T. Tavenner as such special commissioner of the court would with the assent of Ann R. Tavenner upon the payment of the purchase-money in full make a deed as such special commissioner to Barrett and wife. This seems to me to be shown by the wording of this contract taken in connection with the signature thereto, "J. T. Tavenner, commissioner." So understanding this contract, the plaintiff in her bill tendered as an *escrow*, to be delivered on the payment of this purchase-money, a deed duly acknowledged for these fifteen acres of land, precisely such as this contract required, that is a deed with special warranty of title. For if they were to get a deed from J. T. Tavenner as special commissioner of sale in said chancery suit, they were of course to get it without general warranty, as we have shown. And J. T. Tavenner as such special commissioner could alone have made a deed conveying to them the legal title of this land; for the legal title of it as known to the parties was not in Ann R. Tavenner the vendor. The contract in effect was, that Barrett and wife should be substituted for Ann R. Tavenner in the purchase of these fifteen acres of land from J. T. Tavenner, special commissioner in said chancery suit, and on the payment of the purchase-money the deed of this special commissioner was to be made directly to Barrett and wife, and of course only with special

warranty of title. It is true the answer of Sarah V. Barrett pretends, that she was not a joint purchaser with her husband of these fifteen acres of land, and that she never saw this contract till after this suit was brought. But that the real contract was expressed correctly on the face of this contract seems to me obvious. Barrett and wife gave on the same day this contract was dated their joint bonds for the purchase-money of these fifteen acres of land, the bonds stating, that they were given for land purchased that day of Tavenner. These bonds on their face being joint bonds, must be construed as having been given for land jointly purchased, and as a still further evidence thereof, this purchase-money was secured by a deed of trust executed the same day by Caleb G. Barrett and Sarah V. Barrett conveying not the interest of Caleb G. Barrett in the Daniel Stone farm, but conveying the Daniel Stone farm itself, which was owned by Caleb G. Barrett and Sarah V. Barrett, his wife, jointly. The defendants, Caleb G. Barrett and Sarah V. Barrett, having then a right only to a special warranty deed, the affirmative relief asked for in their answer, that this contract may be canceled because the vendor, Ann R. Tavenner, can not make a good title against all the world to these fifteen acres of land is such relief as on the face of their answer it appears they are not entitled to, and the prayer of said answer, that a commissioner should report on the title of the plaintiff could not on the face of this answer be granted. For as they had agreed to take such title to this land as Ann R. Tavenner had, and such as could be conveyed to them by the special commissioner, J. T. Tavenner, it was immaterial, whether this title was good or not; it was all that they contracted for.

I omitted to notice some of the other grounds of demurrer to the amended bill in the case, because they appeared to me to be frivolous, and because they have not been insisted in by the appellant's counsel in this Court. What I have said with reference to this amended bill is a full answer to all the objections to it set out in the demurrer, and in the twenty-three causes of answer assigned so far as they were on any degree plausible. Those not replied to I regard as having been abandoned by the appellant's counsel in his argument in this Court.

We will now further consider, whether there be any other errors in the decree of October 18, 1879, which was appealed from. This decree overruled the exception to the commissioner's report, which had been made prior to the filing of the amended bill, and confirmed said report and ordered certain moneys to be paid out in the order of priority, which had been fixed by said report. This it seems to me was all obviously erroneous. After this report had been filed, the court had sustained a demurrer to the bill and had given leave to the plaintiff, Ann R. Tavenner, to file an amended bill and make numerous necessary parties defendants, who when said report was made were in no manner before the court. This amended bill was filed, and no less than six new parties were made defendants all of whom had a direct and immediate interest in the said report of the commissioner, and none of whom were before the court when said report was made, or had any opportunities of controverting it while it was being made out by the commissioner, not having been in any way notified, that any such report was being made. It seems therefore to have been clearly error to have confirmed this report. The very object in filing the amended bill was to give these six parties an opportunity to be heard, before their rights were acted upon by the court. But what opportunity was really afforded them, when they were by the action of the court denied all opportunity of being heard before a commissioner, before whom alone it was possible to show, that there were errors in this report? For the errors likely to occur in such a report are not errors of law, which would appear on the face of the report, but are errors of fact as to the amount of the debts, which were liens on the lands of the defendants, Barrett and wife. This cause ought by the decree of October 18, 1879, to have been referred back to a commissioner to ascertain the liens on the lands in the bill named and their priorities, and with instructions by the court in reference to all matters, which could then have been properly determined by the court.

The portion of said decree principally complained of by the appellants, The Life Insurance Company of Virginia, in this case is, in these words: "The court doth decide, adjudge, order and decree, that the deed of trust given by C. G. Bar-

rett and S. V. Barrett to W. W. Van Winkle and B. M. Ambler, trustees, to secure The Life Insurance Company of Virginia described in the papers in this cause, bearing date and duly admitted to record on the 25th day of September, 1875, is invalid, null and void and of no effect whatever." This decision was based on the fact, that this deed was acknowledged by both the grantors before W. W. Van Winkle, a notary public, and on this acknowledgment only was admitted to record. And W. W. Van Winkle being one of the trustees or grantees in said deed, this acknowledgment and recordation of this deed was regarded by the court as invalid. The appellant's counsel insist, that the court ought not and could not properly determine this question in this cause in any way, because the bill filed by Ann R. Tavenner and J. T. Tavenner expressly admitted the validity of this deed of trust as a subsisting and unsatisfied lien. Yet these plaintiffs when the cause was before the commissioner by their attorney raised this question for the first time, and had it reported at their instance to the court. After this when the amended bill was filed, the plaintiff Ann R. Tavenner makes no suggestion in her bill, that this deed of trust is invalid, but admits that it is valid and a subsisting lien. But Sarah V. Barrett in her answer to this amended bill says, that "she is advised and informed, that by reason of the acknowledgment of said deed having been taken by W. W. Van Winkle, a notary public, who was the same W. W. Van Winkle who is named in the deed as a trustee, and in whom the legal title would have become vested, had said acknowledgment been properly taken, is invalid and of no effect by reason of said notary having such an interest in said deed as grantee, that he was legally incompetent to take such acknowledgment." It is by appellant's counsel insisted, that on the authority of numerous cases a decree cannot be made between co-defendants unless it be based on pleadings and proof between the plaintiff and defendant, and the following authorities are referred to to sustain this position: *Vance v. Evans*, 11 W. Va. 342; *Worthington v. Staunton*, 16 W. Va. 208; *Ruffner & Co. v. Hewit & Co.* 14 W. Va. 738-741; *Ould & Carrington v. Myers*, 23 Gratt. 383; and that it is a well settled principle, that a decree cannot go outside of pleadings.

See *Burley v. Weller*, 14 W. Va. 273; *Hunter v. Hunter &c.*, 10 W. Va. 321; *Baughner v. Eichelberger*, 11 W. Va. 217, 225, and also *Burleson v. Quarrier*, 16 W. Va. 108.

These propositions of law are unquestionably sound, but it does seem to me, that they have no sort of application to the case before us. The bill and amended bill both set out the various liens claimed to be on the land, in the bill and amended bill named, including this deed of trust, and ask, that "a commissioner be directed to ascertain and report any and all liens of any and every kind whatever existing against said property named, and the order of their priority, and that the court will decree a sale of said property or so much thereof as may be necessary to pay off and discharge the plaintiff's lien, and other liens existing against the said lands as aforesaid, and that a special commissioner be appointed for that purpose." The amount and priority of the various liens including this deed of trust was directly involved in this cause, as stated in the bill and amended bill, and as a matter of course any one of the defendants and more especially Sarah V. Barrett, had a right in her answer to insist, that any one of these liens was originally invalid or that the debt had been paid off; and surely she could not be deprived of this right by the plaintiff saying, that such lien was valid or such debt had not been paid off.

There is in this case a direct issue made by the bill and the answer of Sarah V. Barrett, as to the validity of this deed of trust. The bill alleges it to be valid, and the answer of Sarah V. Barrett denies that it is valid. The decree therefore as to its validity or invalidity is based directly upon the pleadings and proofs between the plaintiff and the principal defendant, and according to the authorities cited by the appellant's counsel this is the very case, where the court may properly render a decree between co-defendants. This question was thus fairly before the court for decision. Was it properly decided? The authorities all agree, that the privity acknowledgment of a married woman taken by the grantee in a deed, whether he be a trustee or not is a void acknowledgment, and as her deed is inoperative and void without such acknowledgment after privity examination and due recordation it follows, that the deed of a married woman

acknowledged by her before the grantee in the deed, though he be a trustee, is an absolute nullity as to her. There are decisions, which go much farther than this and hold, that not only a grantee in such a deed cannot take the privy examination of a married woman, but that no party interested in the deed though not a party to it can take such privy examination. See *Withers v. Baird*, 7 Watts 228. The ground of this decision is, that the taking of an acknowledgment of a married woman is a judicial and not a mere ministerial act. But an acknowledgment by one, who was not a married woman, before one who was interested in a conveyance, though not a party to it, has been held good. See *Dussaume v. Burnett*, 5 Ia. 95, and Waite, C. J., in the *National Bank of Fredericksburg v. Conkey*, United States Court Reports, 4th Circuit, vol. 1 (Hughes) p. 45. This distinction is also recognized in *Stevens v. Hampton*, 46 Mo. 404; and in *Lynch v. Livingston*, 2 Seld. 434.

It has also been universally held so far as I know, that a grantee in a deed, not a trustee, can not take the acknowledgment of a deed of any sort, though it be the acknowledgment of a man and the act a ministerial and not a judicial act. See *Beaman v. Whitney*, 20 Me. 413; *Wilson v. Traer*, 20 Iowa 233; *Stevens v. Hampton*, 46 Mo. 404; *Grovesbach v. Seely*, 13 Mich. 345. In this last case the court says: "We should have no hesitation in holding, that a person could not take an acknowledgment of a deed made to himself. Such a point is too plain for doubt." This doctrine seems to be recognized in *Dussaume v. Burnett*, 5 Ia. 95. In *Kimball v. Johnson*, 14 Wis. 674 an acknowledgment of a deed, which a mortgagee made to a married woman to secure a lien made by her was taken before her husband, and the acknowledgment was held good. But the husband was no party to the deed and could have no interest in it, as it was to secure money loaned as a part of her separate estate. In *Brown v. Moore*, 38 Tex. where Moore and wife gave a deed of trust to secure a debt on the property of the wife, and the trustee took her acknowledgment, the deed was held void because of this defective acknowledgment. And in *Stevens v. Hampton et al.*, 46 Mo. 407 a deed, which was acknowledged by a grantor, a man, before the grantee, who was a trustee with a power

to sell the property was held to be not properly acknowledged for recordation, and what seems to me to be the correct principle was laid down, that when a recorded instrument shows upon its face, that the acknowledgment was taken by a grantee, though he were but a trustee with power to sell, it is improperly recorded, and is no constructive notice; but when the deed is fair upon its face, it is the duty of the register to receive and record it, and its record operates as notice notwithstanding there may be some hidden defect. Yet a conveyance though improperly acknowledged is good between the parties or those purchasing with actual notice. The court thus reasons:

"The objection to the trustee taking such acknowledgment is analogous to the one forbidding a judge to pass upon his own case. Though this act may not be strictly judicial, it is of a judicial nature and requires disinterested fidelity. We know that in practice such a trustee is always selected by the beneficiary; he is controlled by the beneficiary in fixing the time of sale, and its proceeds come into his hands. There is such an interest, that as to the requisite of the deed itself, he should be placed upon a level with other parties, and be incapacitated from holding any official relation to its execution. The want of a proper acknowledgment does not however invalidate the deed (of one *sui juris*) but only goes to the effect of the record. If not acknowledged or proved, its record is not provided for by law, and the fact that it may be copied upon the book of records will not operate as constructive notice to subsequent purchaser. *Dussaume v. Burnett*, 5 Iowa 95; *Lessee of Shults v. Moore*, 1 McLean 520; *Barney v. Sutton*, 2 Watts 31; *Hastings v. Vaughan*, 5 Cal. 315; *Price v. McDonald*, 2 Md. 403; *Johns v. Scott*, 5 Md. 81. The deed however is good as between the parties, (being *sui juris*) and should prevail against subsequent deeds to those who had actual notice of its existence. *Dussaume v. Burnett*, 5 Iowa 95; *Caldwell v. Head*, 17 Mo. 561; *Cooley v. Rankin*, 11 Mo. 647."

With these views I concur and adopt them as my own; for they accord I think with both reason and authority. Of course the holding of this deed of trust of September 25. 1875, to be null and void, so far as it purported to convey

the undivided moiety of Sarah V. Barrett in the Daniel Stone farm, in no manner affects the validity, as against her or her separate estate, of any note or bond for the debt secured by said deed of trust executed by her; but any liability of her separate estate for said debt can not be enforced in this cause, as it is entirely foreign to the purposes of either of these suits to enforce any claim against her separate estate, which is not a specific lien upon it. See *Hughes v. Hamilton*, 19 W. Va. 366. As to what effect the recording of such deed, if seen by a subsequent purchaser with notice it is not proper to decide. See *Friedley v. Hamilton et al.*, 17 Serg. & R. 71; *Peebles v. Reading*, 8 Serg. & R. 496.

It is claimed however, that there is no proof of the identity of W. W. Van Winkle, the trustee, with W. W. Van Winkle the notary public, who took the acknowledgment of this deed of trust given by C. G. Barrett and his wife S. V. Barrett. It was distinctly asserted in the answer of S. V. Barrett, and it has been in no manner denied by the *cestui que trust*, The Life Insurance Company of Virginia, nor by the trustees Van Winkle or Ambler. I think the identity of the name of the trustee and of the notary public raises a presumption, that they were the same person, which would have in some way to be rebutted or at least denied; but so far from its being rebutted it is strongly fortified. The commissioner in his report says: "Your commissioner further reports, that the plaintiffs by their attorneys claim and ask that the same be reported. First, that the deed of trust given by C. G. Barrett and S. V. Barrett to W. W. Van Winkle and B. M. Ambler, trustees, is invalid for the reason that the acknowledgment thereto was taken by one of the trustees, W. W. Van Winkle, a party to the said deed and a party in interest. The foregoing objection is submitted to your honor's consideration. If well taken the priority of the various liens herein reported will be materially changed, and will be as follows." Then follows a new arrangement of all the liens.

It is insisted, that this is a mere report of what is claimed by the plaintiff's counsel, and that it is not reported as a fact, that the trustee and the notary public were the same person. This it seems to me is not a fair construction of this report. It is true that the statement of the order of the liens, if this

deed of trust is regarded as not properly recorded, is made at the instance of the plaintiff's counsel, and that the commissioner submits the question of law as to whether this deed of trust was or was not properly recorded; but he reports as I understand as a fact, that the notary public who took the acknowledgment, was the trustee in the deed. He certainly intended to make out a statement based on the claim of the plaintiff, that this was an unrecorded deed; a statement on which the court could at once act if it held the law to be as the plaintiff's counsel claimed. And this the court could only do if it regarded as a reported fact, that the trustee and the notary public were the same person. As I construe the report this fact was reported. There can be no doubt, but that the commissioner intended to report this as a fact, and I think his report should be so interpreted. It was not excepted to on this account; but it was treated by the court, as though this fact was reported. I think that it is proper to treat that as a fact established, if not admitted.

My conclusion therefore is, that the decree of October 18, 1879, must for the reasons we have stated be reversed, set aside and annulled, and the appellants must recover of the appellees their costs in this Court expended; and this Court proceeding to render such decree as the circuit court of Wood county should have rendered, the following decree must be entered up:

These causes came on to be heard together, the same having been by consent heretofore considered, the first of the above named causes being heard on the amended bill of Ann R. Tavenner, and the demurrer thereto of C. G. Barrett and Sarah V. Barrett, in which the complainant joined, the joint and separate answer of The Life Insurance Company of Virginia, W. W. Van Winkle and B. M. Ambler trustees, and general replication thereto, the joint and separate answers of C. G. Barrett and Sarah V. Barrett, his wife, to said amended bill, and general replication thereto, the report of Henry Amiss, commissioner, and the exceptions thereto; and the second of said causes being heard on the bill filed at the August rules, 1879, by C. G. Barrett and Sarah V., his wife, against R. C. Tracewell, trustee, and John Buford, and on the injunction awarded said bill, and the answer of

R. C. Tracewell thereto, and general replication thereto, on consideration whereof the said injunction granted in this second of said causes is dissolved; and it is adjudged, that the defendants John Buford and R. C. Tracewell, trustee, recover of the plaintiffs Caleb G. Barrett and Sarah V. Barrett, his wife, their costs about their defense expended. And in the first of said causes the said demurrer to said amended bill is overruled; and the Court being of opinion, that the report of Commissioner Henry Amiss was made, when numerous parties defendant now in said cause were not parties to said cause, and that they had no notice of said report, it would be improper for the Court to act on said report now; the decree should for this reason be set aside, and the cause recommitted to said commissioner or to another commissioner with proper instructions as to the making out of said report.

And it appearing to the court, that the Daniel Stone farm of about seventy acres is now owned jointly by Sarah V. Barrett and John Buford, the said John Buford having purchased the undivided moiety thereof formerly owned by Caleb G. Barrett, when sold by R. C. Tracewell under the deed of trust executed by C. G. Barrett and Sarah V. Barrett on the 10th day of April, 1877, and this Court having heretofore decided, that said deed of trust was null and void, so far as it conveyed the interest of Sarah V. Barrett in said David Stone farm, therefore the Court is of opinion and doth decide, that John Buford now owns the undivided moiety of said Daniel Stone farm, which had belonged to Caleb G. Barrett, subject to all the judgments and other liens by deed of trust on said undivided interest of Caleb G. Barrett, which were valid and binding on it against a purchaser for valuable consideration without notice on the 16th day of April, 1877, when said deed of trust was executed and recorded, under which said Buford purchased; and the Court is also of opinion and doth decide, that the deed of trust executed by Caleb G. Barrett and Sarah V. Barrett, his wife dated September 25, 1875, is invalid, null and void, so far as it purported to convey or to create any lien on the undivided moiety of said Daniel Stone farm, owned by Sarah V. Barrett as her separate estate, and that said deed of trust is also invalid and void

as against all judgments rendered against Caleb G. Barrett, and as to all purchasers from him for valuable consideration without notice; but that the said deed of trust is valid and binding as an unrecorded deed on said Caleb G. Barrett and all purchasers from him with notice of said deed of trust.

The Court is also of opinion, that all judgments rendered by courts of common law or by justices of the peace against Sarah V. Barrett on contracts expressed or implied, made during her coverture, are null and void as against her, and created no liens on her land, the same being rendered against by her courts or justices, who had no jurisdiction to render such judgments against a married woman. And the Court is also of opinion and doth decide, that the plaintiff, Ann R. Tavenner, has a first lien on the parcel of fifteen acres of land sold by her to C. G. Barrett and Sarah V. Barrett, for the purchase-money of said land, six hundred dollars, with interest from August 27, 1877; and that she has also a good and valid lien as of August 27, 1877, for said six hundred dollars and interest on the undivided moiety of Sarah V. Barrett in the Daniel Stone farm, but that she has now no lien on the undivided moiety of said Daniel Stone's farm, now owned by John Buford, by reason of the deed of trust executed by said C. G. Barrett and wife of that date. Inasmuch as the said undivided interest of Caleb G. Barrett has been sold under a previous deed of trust of April 16, 1876, and was purchased by John Buford at the price of eight hundred dollars; but he has a valid lien on any surplus, which may be in the hands of the trustee, R. C. Tracewell, after paying off the expenses of said sale and the debt of John Buford secured by said deed of trust purged of the usury in said debt.

It is therefore adjudged, ordered and decreed, that this cause be referred to one of the commissioners of the circuit court of Wood county, who is hereby directed to ascertain, state and report the number, amount and priorities of all liens by judgments against Caleb G. Barrett, which were re-docketed prior to the 10th day of April, 1877, and which are liens on the undivided moiety of said Daniel Stone farm, now owned by John Buford; and he shall also charge as a lien on the said undivided moiety of said land now owned by John Buford, the debt secured by the deed of trust executed

by C. G. Barrett and wife on the 25th of September, 1875, to Van Winkle and Ambler, trustees, provided on enquiry it be shown, that the trustee, R. C. Tracewell, in the deed of trust of April, 16, 1879, or John Buford, the *cestui que trust* in said deed of trust, had such actual notice of the said deed of trust of September 25, 1875, as made them purchasers of said land with notice.

The said commissioner is also directed to ascertain and report what liens are now existing on the undivided moiety of Sarah V. Barrett in said Daniel Stone farm and their priorities, taking care in ascertaining the same not to treat as liens on the same any debts or judgments, which are hereinbefore decided not to be liens on the same. And the said commissioner is further directed to ascertain and report the amount of the purchase-money due for the purchase of the fifteen acres of land by C. G. Barrett and wife of Ann R. Tavenner, which is a first lien on said fifteen acres, and he shall also ascertain what other debts are liens on the said fifteen acres of land, or on the interest of either C. G. Barrett or Sarah V. Barrett in said fifteen acres of land and their priorities.

The Court doth further adjudge, order and decree, that the defendants C. G. Barrett and Sarah V. Barrett, on the allegations made in their said answer, are not entitled to the affirmative relief asked for in their said answer, they being entitled only to a deed with special warranty of title upon said fifteen acres of land bought of Ann R. Tavenner, when they pay the whole of the purchase-money, and are therefore entitled to no order of reference to ascertain, whether the title to said land is good. And the Court declines to decide, whether partition of said Daniel Stone farm should be made between Sarah V. Barrett and John Buford till said report of said commissioner is returned. And this cause is remanded to the circuit court of Wood county to be further proceeded with according to the written opinion aforesaid, and further according to the principles governing courts of equity.

JUDGES JOHNSON AND SNYDER CONCURRED.

DECREE REVERSED. CAUSE REMANDED.

WHEELING.

MATHEWS v. GREER.

Submitted January 11, 1883—Decided June 30, 1883.

The statutes of this State—chap. 66 of the Code—authorize a married woman, living with her husband, to maintain an action at law for the recovery of the possession of her separate real property without uniting her husband in the action.

Writ of error and *supersedeas* to a judgment of the circuit court of the county of Jackson, rendered on the 19th day of November, 1881, in an action in said court then pending, wherein Mary M. Mathews was plaintiff, and John M. Greer was defendant, allowed upon the petition of said Greer.

Hon. Robert F. Fleming, judge of the sixth judicial circuit, rendered the judgment complained of.

SNYDER, JUDGE, furnishes the following statement of the case:

This is a writ of error from a judgment of the circuit court of Jackson county, pronounced November 19, 1881, in an action of unlawful detainer originally commenced before a justice and brought by appeal to said circuit court. The summons commencing the action was issued by the justice September 12, 1881, and requires the defendant, John M. Greer, to answer the complaint of the plaintiff, Mary M. Mathews, "in a civil action for unlawfully withholding from her twenty acres of land, *her separate estate*, situate," &c. and concludes as follows: "In which action the plaintiff will claim judgment for the possession of the premises unlawfully detained as aforesaid, and twenty-five dollars damages for the unlawful detention thereof, as well as the costs of this suit in her behalf expended." The defendant moved the court to quash the summons, because the husband of the plaintiff was not joined with her as a plaintiff in the action, which motion the court overruled. The defendant then filed a plea averring therein that the plaintiff was at the commencement of the action and still is the wife of, and

living with, one R. N. Mathews, to which the plaintiff replied specially, admitting the averments of the said plea and alleging that "her said action concerns her sole and separate estate." To the filing of said replication the defendant objected, but the court overruled the objection. The defendant, also, pleaded not guilty, on which plea issue was joined. A jury was sworn to "try the issue joined" &c., and it found a verdict in these words: "We, the jury, find for the plaintiff the land in the within summons mentioned, and described by metes and bounds as therein set out, and that the defendant unlawfully withheld the possession thereof from the plaintiff at the institution of this suit, but had not so held for three years prior to that date, and we do so assess the plaintiff's damages at ten dollars."

The defendant moved the court to set aside the verdict which motion the court overruled and entered judgment for the plaintiff on said verdict. There is no bill of exceptions in the record and none appears to have been taken, but under our statute "a party may avail himself of any error, appearing on the record, by which he is prejudiced, without excepting thereto." Section 9, chapter 131, Code, p. 627.

No appearance for plaintiff in error.

John H. Riley for defendant in error cited the following authorities: 18 Ark. 236; Code ch. 125 § 20; 10 W. Va. 122; 6 Ohio St. 182; 7 W. Va. 152; 10 Bac. Abr. 325; 12 W. Va. 521; 13 W. Va. 9; 16 W. Va. 555; 18 W. Va. 766; 3 W. Va. 452; 8 W. Va. 245; 10 W. Va. 115; 12 W. Va. 516; 11 W. Va. 94.

SNYDER, JUDGE, announced the opinion of the Court:

The plaintiff in error has neither argued nor filed any brief in this Court; but in his petition for a writ of error it is assigned that the circuit court erred: (1) In refusing to quash the plaintiff's summons; (2) In allowing the plaintiff to file her replication to the defendant's special plea; (3) In not disposing of the question raised by the plea of coverture before submitting the main issue to the jury; (4) Because the jury was not sworn "to try whether the defendant unlaw-

fully withholds the premises in controversy;" (5) Because the "verdict is not responsive to the issues joined;" and (6) Because the court refused to set aside the verdict of the jury.

These alleged errors taken together present but two legal questions: *First*—Can a married woman living with her husband maintain an action for the possession of her *separate real estate* without joining her husband as plaintiff in the action? and *second*: Was there any such defect or irregularity in the swearing of the jury or in the verdict as will warrant this Court in reversing the judgment of the circuit court? Without, therefore, noticing separately the plaintiff's numerous assignments of errors, I shall proceed to consider the two questions stated; and the determination of them in my judgment necessarily disposes of all the said assignments.

1. Can the plaintiff, being a married woman, maintain this action? By the common law a married woman could have no legal separate estate, and she could not, therefore, sue at law, because courts of law take cognizance of the legal title only. Unless, then, her right to sue is conferred by statute, it is clear that no such action can be maintained. By our statute—sec. 12, chap. 66, Code p. 449—it is declared that: "A married woman may sue and be sued without joining her husband in the following cases: I. Where the action concerns her separate property," &c. And this Court, following the New York decisions, from which State our statute was taken, has held that under our statute—sec. 3, chap. 66, Code p. 448—a married woman acquires and holds a legal and not a mere equitable estate—*Stockton v. Farley*, 10 W. Va. 174; *Radford v. Carwile*, 13 *Id.* 660. And while the statute does not remove the legal incapacity which prevents a married woman from making any contract, still her right to sue for trespasses committed upon her separate estate would seem to be a necessary incident of the ownership of such estate. Formerly having but an equitable title she could only obtain redress in equity, but now having a legal estate she may sue at law. She is not only the legal owner of her separate estate, but she is under the statute entitled to the rents and profits and, consequently, the possession of her

estate real as well as personal. In New York it has been held under a statute svery similar to ours that a married woman may even sue her husband at law for the possession of her real estate—*Minier v. Minier*, 4 Lans. 421.

Before the enactment of the statute a married woman not only did not hold the legal title to her separate estate, but she could not hold the possession of it. By her marriage she became absorbed in her husband so far as her legal rights to property were concerned. Her goods and chattels and the possession of her real estate became by virtue of the marriage vested in her husband during the coverture. And as courts of law could not regard equitable titles nor permit the recovery of real estate by a person not entitled to the possession, she could not sue at law. But the statute having removed these common law obstructions and expressly declared that she may sue concerning her separate property without joining her husband, it seems to me, there can be no question or doubt about her right to sue in an action such as this for the recovery of possession of her separate real estate without joining her husband. If she cannot sue at law, she cannot sue at all. Her husband has no title or right to the land, and having the legal title, she cannot sue in equity for its possession. I am, therefore, clearly of opinion that the plaintiff properly brought this action.

2. Was there any such defect or irregularity in the swearing of the jury or in the verdict as will require this Court to reverse the judgment of the court below? The jury was sworn to "try the issue joined." It is insisted that this was error, and that it should have been sworn "to try whether the defendant unlawfully withholds the premises in controversy." It is also insisted that the "verdict is not responsive to the issues joined." These irregularities are merely formal and could in no manner have prejudiced the defendant. The form of the oath and the verdict of the jury in this case are very similar and more regular than was the case in *Mann v. Bryant*, 12 W. Va. 516, yet this Court refused to reverse the judgment in that case. Verdicts of juries are to be favorably construed; and if the point in issue is substantially decided by the verdict, it is the duty of the court to mould it into form. The court will not set aside a verdict

for a merely formal defect—*Lewis v. Childers*, 13 W. Va. 1; *Lawson v. Dalton*, 18 *Id.* 766.

Upon the whole record, I am of opinion, that there is no error, for which the judgment of the circuit court ought to be reversed. The said judgment must, therefore, be affirmed with costs to the defendant in error and thirty dollars damages.

THE OTHER JUDGES CONCURRED.

JUDGMENT AFFIRMED.

WHEELING.

GRAHAM *et al.* v. GRAHAM *et al.*

Submitted January 18, 1883—Decided June 30, 1883.

When questions of fact are submitted to a commissioner in chancery, his findings thereon should be sustained unless the court is fully satisfied that the evidence before the commissioner does not warrant them. This rule applies with increased force to an appellate court when called upon to reverse the decree of the court below approving such findings; and when the testimony, on which the findings are founded, consists chiefly of opinions of witnesses and not facts deposed to, the decree of the court below approving such findings will not, except in a plain case, be reversed by the appellate court. (p. 701.)

Appeal from and *supersedeas* to two decrees of the circuit court of the county of Monroe, rendered respectively on the 19th day of May, 1879, and on the 16th day of May, 1880, in a cause in said court then pending, wherein John Graham and others were plaintiffs and James Graham and others were defendants, allowed upon the petition of said plaintiffs.

Hon. Homer A. Holt, judge of the eighth judicial circuit, rendered the decrees appealed from.

The facts of the case are stated in the opinion of the Court.

James F. Patton, for appellants.

21	698
36	406
21	698
38	677

21	698
44	157
45	727

21	698
48	406
48	579
48	682

21	698
64	387

Samuel Price and John A. Preston for appellees.

SNYDER, JUDGE, announced the opinion of the Court:

This is the third time this cause has been before this Court upon different appeals. The reports of the two former appeals will be found in 10 W. Va. 355 and 16 *Id.* 608, and the opinions of this Court therein reported are here referred to for a complete history of this controversy and all the proceedings had in relation thereto prior to the decree of October 16, 1880. The present appeal is from the said decree of October 16, 1880, and a decree of May 19, 1879, which had been rendered before the decision of the Court reported in 16 W. Va. 608.

Prior to said last mentioned decree the cause had been referred to a commissioner to report the rental value of two hundred and eighty-six acres of land, mentioned in the proceedings, and also the cost of supporting Rebecca Graham. The commissioner made and filed his report which was excepted to by both the plaintiffs and defendant, James Graham. The court by said decree of May 19, 1879, overruled the plaintiffs' exceptions to the first and third statements of said report and the defendant's exception as to the "slave fund" and sustained defendant's exception to the second statement, and recommitted the report with instructions to report further as to the said "slave fund." From this decree and a former one, rendered May 17, 1878, the defendant, James Graham, appealed to this Court. The said commissioner's report, exceptions and decrees will be found given, *in extenso*, on pages 612 to 619 inclusive of the said volume 16 of West Virginia Reports, and it is, therefore, unnecessary to repeat them here as they can be read in connection with this opinion. By reference to pages 623 and 624 of said volume of reports it will be seen that this Court by its decree of May 1, 1880, reversed said decree of May 19, 1879, in so far as it relates to and adjudicates as to the proceeds of the "slave fund" with costs in favor of the appellant, James Graham, against the administrator, Kelly, but no further, holding that the other matters of said decree were not covered by the said appeal and could not properly be considered by the Court. And proceeding then to render such decree as

the circuit court should have rendered, this Court "decreed that the cause as to the said H. J. Kelly, administrator of Joseph Graham, deceased, be dismissed, and that the petition of said Kelly, administrator, be also dismissed, but *without costs* as against said Kelly, administrator, as aforesaid."

In entering the decree of this Court by a clerical error, inadvertently made, instead of the italicized words "*without costs*," above given, the words *with costs* were inserted in the decree; and, I presume, the mandate sent from this Court to the said circuit court contained said erroneous words because the said circuit court by its decree of October 16, 1880, professing to following the said mandate of this Court, dismissed the said petition *with costs* against said Kelly, administrator as aforesaid. The clerical error of this court, just referred to, was corrected at this term by an order made on the 29th day of June, 1883, which will be certified to said circuit court and that court is now directed to correct its said decree of October 16, 1880, so as to make it conform to the mandate of this Court as now correctly entered.

Omitting the recitals and formal parts, the said decree of the circuit court of October 16, 1880, is as follows: "And it is further adjudged, ordered and decreed that R. F. Dennis, the special receiver in this cause in this Court, do collect and pay over to the said James Graham the said "slave fund" which was left in his hands by an order heretofore made to loan out upon security, with interest according to law, and report his proceedings to court at the next term thereof.

"And it is further adjudged, ordered and decreed that the plaintiffs recover their costs in this suit expended against the defendants, except on the petition aforesaid."

The only error complained of in this decree is that the court improperly ordered the payment of the "slave fund" to James Graham without retaining enough of said fund to pay the costs decreed against him and the balance reported as due from him by the second statement of the commissioner's report—the said James Graham, as the appellants allege, being insolvent.

By reference to said decree of May 19, 1879—see 16 W. Va. page 613—it will be seen that the court sustained the

exception to and disallowed and rejected said second statement of the commissioner's report, and there being no evidence in the record to establish the insolvency of James Graham or of his inability to pay the costs decreed against him and the other defendants, consequently, unless the sustaining of the exception to, and rejecting, the said second statement of the commissioner's report by the said decree of May 19, 1879, was erroneous, there was no error in said decree of October 16, 1880, of which appellants can complain. Was there any error in the said decree of May 19, 1879?

Before proceeding to consider this inquiry, it is proper to observe that, while the said decree disposes of the exceptions to the commissioner's report, it does not confirm the same or in any manner dispose of or order the payment of the amounts found due to James Graham by the first and third statements of said report which seem to have been approved by said decree. Technically, therefore, said decree is not final, and ordinarily an appeal would not be entertained therefrom—*Laidley v. Kline, supra*, p. 21.

The said decree, however, differs materially from that appealed from in *Laidley v. Kline*. In that case there were items and claims in the report other than those excepted to and acted on by the court, while in this there were no other matters in the report than those excepted to and acted on by the decree, and the court by its action on all the exceptions adjudicated the matters in the report as effectually as if it had formally confirmed the same. The omission to confirm the report, being merely an irregularity in form and not in substance, I do not think this Court should now, especially in view of the repeated appeals and protracted litigation already had in this cause, further delay the consideration of the questions presented by this appeal upon any formal or technical ground, but think said questions should be disposed of on their merits as far as can now be done.

The appellants insist that the court, by its said decree of May 19, 1879, erred in overruling their exceptions to the first and third statements of the commissioner's report and in sustaining the defendants' exception to the second statement of said report. These exceptions appear in full on pages 618 and 619 of 16 West Virginia reports, and the questions raised

by said exceptions and the errors complained of relate exclusively to the weight of the evidence so far as the first and second statements of said report are involved. The record before us shows, that the commissioner took and returned with his report the depositions of thirty-five witnesses as to the rental value of the two hundred and eighty-six acres of land and the expense of supporting Rebecca Graham. Twenty-one of these depositions were taken on behalf of the appellants and fourteen on behalf of the appellee, James Graham. The testimony consists almost entirely of the opinions or estimates of the witnesses; and while the opinions of the witnesses on either side are remarkably uniform as to the values estimated by them, the difference of those on the one side as compared with those on the other, is strikingly great, being more than two hundred *per cent.* It is obvious from the reckless disparity that the witnesses were very deficient in capacity and information or regardless of their duty in forming a just estimate and stating it honestly and fairly. Taking the whole testimony together, I can form no other conclusion of its character.

The commissioner, as I judge from the results of his report, made a general average of the estimated values fixed by the witnesses of each of the opposing parties and based his report on the mean sum obtained by dividing the average thus derived from the witnesses of the respective parties. Whether this is a safe and proper mode of weighing and reconciling conflicting testimony and deducing a result therefrom may well be questioned, but considering the extraordinary character of the testimony in this particular instance, the commissioner was, perhaps, warranted in the course, apparently, adopted by him. However this may be, it is certain that a report founded on such testimony and approved by the court below, could not upon any safe principle or rule of law be disturbed by an appellate court. Any interference with the conclusions of the commissioner and the court below could be made only upon mere fancy and the wildest conjecture. It is a settled rule of law that when questions of fact are submitted to a commissioner, his findings upon such facts should be sustained unless the court is fully satisfied from the evidence that such findings are erroneous—*Boyd & Co. v. Gun-*

nison & Co., 14 W. Va. 1. This rule operates with peculiar force in an appellate court; and in cases like the present, where the testimony, on which the findings of the commissioner are founded, consists almost entirely of the opinions of witnesses and not of facts deposed to, the findings of the commissioner will generally be regarded by the Appellate Court conclusive, and such we regard them in this case. The circuit court did not, therefore, err in overruling the plaintiff's exception to the first and sustaining the defendant's exception to the second statement of the commissioner's report.

But we are of opinion that the said court did err in overruling the appellant's exception to the third statement of said report relating to taxes alleged to have been paid by the appellee, James Graham. The order of reference under which the report was made—16 W. Va. p. 609—embraced but two enquiries: The rental value of the two hundred and eighty-six acres of land, and the expense of supporting Rebecca Graham, and this statement is altogether foreign to either of those subjects. Moreover, there was no proof taken in support of said statement and so far as the record discloses, it is a mere *ex parte* statement made without evidence or notice to the opposite party. In addition to all this, it is possible that the witnesses in their estimates of the rental value of the two hundred and eighty-six acres of land, on which it is claimed these alleged taxes accrued, may have excluded said taxes from the gross rental value and thus given credit to the appellee, James Graham, therefor; and, consequently, if he is now again given credit for them as a separate charge he will be allowed for them twice. Whether this is so or not, does not appear; but as such may have been the fact, and as the burden of proof was on him who asserts the claim as a separate charge, it was his duty to show affirmatively that such was not the fact, and having failed to do so, the said taxes must be excluded as a separate charge.

For this error the said decree of May 19, 1879, in so far and so far only as it overrules the appellants' exception to the said third statement of the commissioner's report, must be reversed with costs to the appellants against the appellee, James Graham; and this cause is remanded to the said circuit court with directions to confirm the first and reject the second and

third statements of said commissioner's report, to correct the said decree of October 16, 1880, as hereinbefore indicated and for any further proceedings necessary to a final disposition of the cause.

THE OTHER JUDGES CONCURRED.

DECREE REVERSED IN PART. CAUSE REMANDED.

WHEELING.

O'BRIEN v. BRICE *et al.*

| 21 704 |
| 146 778 |

Submitted June 7, 1883—Decided June 30, 1883.

1. A tract of land is conveyed to a husband and R., his wife, jointly; the husband dies intestate leaving children; and the said R., his widow, being his administrator, then executes a deed to a third party for said land, in the premises of which she is mentioned as "R., in her own right as widow, and also as administratrix;" the grant in the deed is of the land without qualification and the deed is signed, "R. in her own right, R. as administratrix."
- HELD:

That said deed operates as a conveyance not only of the dower interest of the said widow in the land, but also as a conveyance of the moiety owned by her in fee. It conveys her entire interest in the land. (p. 706.)

2. In the interpretation of written instruments very little consideration is given by the courts to punctuation. It is never allowed to interfere with the usual and natural sense and meaning of the language employed. (p. 707.)

Appeal from and *supersedes* to a decree of the circuit court of the county of Hancock, rendered on the 28th day of June, 1880, in a cause in said court then pending, wherein James O'Brien was plaintiff, and Anna A. Brice and others were defendants, allowed upon the petition of said O'Brien.

Hon. Thayer Melvin, judge of the first judicial circuit, rendered the decree appealed from.

SNYDER, JUDGE, furnishes the following statement of the case:

James O'Brien filed his bill, October 7, 1878, in the circuit court of Hancock county against Anna A. Brice and others, in which he avers, that Robert and Ephriam Brice by deed, dated March 15, 1867, conveyed to William Brice and Rebecca C. his wife, jointly, a tract of one hundred and forty-eight acres of land situate in said county; that afterwards said William died intestate, leaving four infant children as his heirs-at-law and his widow, the said Rebecca C., surviving him; that the said Rebecca C. by deed, dated November 20, 1875, conveyed all her right, title and interest in said tract of land to Thomas O'Brien in trust to secure the payment of a debt due to plaintiff; that the said O'Brien trustee, by virtue of, and pursuant to, the terms of said trust deed, sold said land and the plaintiff became the purchaser thereof, and the same was conveyed to him by deed, dated June 18, 1877; but that prior to the date of said trust deed of November 20, 1875, the said "Rebecca, in her own right as widow, and also as administratrix of William Brice deceased," had conveyed the said tract of land to A. McC. Flanegin in trust to pay and secure certain debts therein mentioned, amounting to over two thousand dollars, due to Ephriam Brice and others. The plaintiff charges that this last mentioned "deed is null and void except in so far as it conveys the dower right of said Rebecca in said land to said trustee;" and that by virtue of said deed from Thomas O'Brien, trustee, to plaintiff he is the owner of the one undivided moiety of said one hundred and forty-eight acres of land.

The said widow, children and trust creditors are made defendants, and the bill prays, that the said deed of November 5, 1875, to A. McC. Flanegin, trustee, may be declared void except so far as it conveys the dower interest of said widow in said land, that commissioners may be appointed to make partition of said land between the parties entitled thereto, and for general relief.

The said deed of November 5, 1875, therein referred to, and exhibited as a part of the plaintiff's bill, shows that it had been duly admitted to record in Hancock county November 9, 1875, and so far as it is material to give it in this case, it is as follows: "This deed, made the fifth day of November, in the year 1875, between Rebecca C. Brice, in her own

right as widow, and also as administratrix of the estate of William Brice, deceased, (late her husband), of the first part, and A. McC. Flanegin, trustee, of the second part, witnesseth: That the said party of the first part doth grant unto the party of the second part, with general warranty, the following property:" Here the said tract of one hundred and forty-eight acres of land is described, the debts secured specified and the terms of the trust defined. The deed, then, concludes and is signed as follows: "Witness my hand and seal.

"REBECCA C. BRICE, [SEAL.]

"In her own right.

"REBECCA C. BRICE, [SEAL.]

"As Administratrix of Wm. Brice, deceased."

The punctuation of the deed, as shown by the transcript before this Court, is precisely as I have given it above.

The defendants appeared at rules and filed a demurrer in writing to the bill, and the court, at a term held June 28, 1880, entered a decree sustaining the demurrer, "and the plaintiff not desiring to amend his said bill," the cause was dismissed with costs to the defendants. From this decree the plaintiff has appealed.

G. W. Caldwell for appellant.

No appearance for appellees.

SNYDER, JUDGE, announced the opinion of the Court:

It is properly conceded by the plaintiff and defendants that, by the terms of the aforesaid deed of March 15, 1867, from Robert and Ephriam Brice to William Brice and Rebecca C. his wife, the said Rebecca C. became the owner in fee of one undivided moiety in said land and by the death of her husband she became entitled to a dower in the other moiety. It results, then, that, at the time she made the deed of November 5, 1875, she was the owner in fee of one-half of the said tract of land and had dower in the other half, the remainder in the latter half having become vested in the infant children of said William Brice, deceased. If said deed conveyed her whole interest in said land in trust, then the subsequent deed of November 20, 1875, to Thomas

O'Brien, trustee, passed no title or interest except the equity of redemption subject to the satisfaction of the debts secured in said prior deed, and the plaintiff, who claims title under that deed, acquired no title or interest from said trustee other than said equity of redemption. The simple and only question, therefore, presented by the demurrer is, did said deed of November 5, 1875, convey both the moiety and the dower owned by said Rebecca C. in said land? Of course she could convey nothing as administratrix having no power or authority to do so.

It is argued by the appellant's counsel that a proper interpretation of said deed limits its operation to a conveyance of the dower-interest only; and he relies principally upon the punctuation used in the premises to justify this conclusion.

In the interpretation of written instruments very little consideration is given by the courts to the punctuation, and it is never allowed to interfere with or control the sense and meaning of the language used. The words employed must be given their common and natural effect regardless of the punctuation or grammatical construction. If the construction contended for by the appellant is permitted, the words "in her own right" can have no effect; because a conveyance of her dower and a conveyance of her dower in her own right mean one and the same thing. This would be equivalent to an entire elimination of those words from the deed. Such a construction would violate the well settled rule, that where it is possible, effect must be given to every sentence, phrase and word, and the parts must be compared and considered with reference to each other. Applying this rule and changing the punctuation the sentence will read, "Rebecca C. Brice in her own right, as widow and also as administratrix." This gives to the words their common and natural meaning, and gives effect to each word and the whole sentence together. In this form it is apparent that the deed conveys not only the dower, but the moiety held by the grantor in her own right. This it seems to me was clearly the intention of the parties, as shown by other parts of the deed. The granting clause, which is the controlling and operative part of every deed, conveys the land absolutely without any limitation or qualification whatever; and if the

grantor had intended to grant her dower right only, the granting clause would have been the proper, if not the only part of the deed, where she could have expressed that intention. Descriptive words in the premises usually can have no other effect than to designate the parties and will not be construed as limitations of the estate conveyed. The intention is made still more obvious by the manner in which the deed is signed—*Smith v. Henning*, 10 W. Va. 600.

My conclusion, therefore, is that the said deed of November 5, 1875, operated as a conveyance of all the interest held by the said Rebecca C. Brice in the said tract of one hundred and forty-eight acres of land, and said deed having been recorded before the deed of November, 20, 1875, under which the plaintiff claims, was executed, the latter deed conferred upon the grantee therein no title or estate except the equity of redemption, and consequently said equity is all the plaintiff had when he instituted this suit. The legal title to the land, being thus vested in other persons, and the plaintiff's bill not having been framed for the purpose of obtaining a partition of the land subject to the said trust-deed of November 5, 1875, the court below properly sustained the demurrer to the bill.

It is probable a bill might have been drawn, or the one in this cause so amended, as to have entitled the plaintiff, as owner of an equity, to a partition of the land subject to the lien of the prior trust-deed, but as he declined to amend his bill in the circuit court, that court rightfully dismissed his bill with costs.

For these reasons, I am of opinion that the said decree of the circuit court of June 28, 1880, should be affirmed with costs to the appellees and thirty dollars damages.

THE OTHER JUDGES CONCURRED.

DECREE AFFIRMED.

WHEELING.

BLACK'S ADMINISTRATOR v. THOMAS.

Submitted January 24, 1883—Decided June 30, 1883.

21	709
34	506

21	709
36	216

21	709
38	566

21	709
39	107

21	709
39	668

21	709
46	159

21	709
50	315

21	709
54	386

21	709
57	98

21	709
61	244

1. The verdict of a jury, which necessarily disposes of all the issues in the case, is sufficient, although it may not respond separately to each several issue or fact presented by the pleadings. (p. 711.)

2. In an action of *assumpsit* the defendant pleads payment and files with his plea specifications of sets-off exceeding in amount the demand of the plaintiff, and the jury by its verdict finds for the defendant simply a gross sum. **HELD:**

That under section 9 of chapter 126 of the Code, such verdict must be interpreted as a finding that the sets-off of the defendant exceeded the amount to which the plaintiff was entitled by the sum so found, and the verdict is not, therefore, ambiguous or uncertain. (p. 711.)

3. Where the evidence and not the facts is certified in the bill of exceptions the appellate court will not reverse the judgment unless, after rejecting all the conflicting parol evidence of the exceptor and giving full faith and credit to that of the adverse party, the decision of the trial-court still appears to be wrong. (p. 712.)

4. Where the matters certified in form as facts are in any respect conflicting, such certificate must be treated as containing the evidence and not the facts. (p. 712.)

5. If the verdict can not be sustained according to the foregoing rules, it is as much the duty of the trial-court to set the same aside in such case as it is its duty to sustain the verdict when it does not contravene said rules; and while the appellate court ought not to set aside the verdict with the same facility as the trial-court, because in such court the weight which must always be given to the verdict of a jury fairly rendered is supplemented by that of the opinion of the judge who presided at the trial which is entitled to peculiar respect upon the question of a new trial upon the ground that the verdict is contrary to the evidence, still the action of the trial-court in such cases may be reviewed by the appellate court and in a clear and plain case it is the duty of that court to set aside the verdict and order a new trial. (p. 712.)

6. Other rules and principles stated which should govern courts in denying or granting motions to set aside the verdict of a jury upon the ground that it is not warranted by the evidence. (p. 712.)

7. A case in which the appellate court set aside a verdict and ordered a new trial upon the ground that the verdict was clearly and plainly unsupported by the evidence. (p. 714.)

Writ of error to a judgment of the circuit court of the county of Putnam, rendered on the 9th day of March, 1878, in an action in said court then pending, wherein Villie Black & Co. were plaintiffs, and John C. Thomas was defendant, allowed upon a petition of William H. Hogeman, administrator of Villie Black, deceased.

Hon. Joseph Smith, judge of the seventh judicial circuit, rendered the judgment complained of.

The facts of the case are stated in the opinion of the Court.

W. H. Hogeman for plaintiff in error.

Mollohan & Fontaine and *Smith & Knight* for defendant in error cited 1 Bibb. 247; 2 Burr. 698; 1 Rob. (old) Pr. 355, and 7 Leigh 82.

SNYDER, JUDGE, announced the opinion of the Court:

This is a writ of error to a judgment of the circuit court of Putnam county entered May 3, 1880, affirming a judgment of the county court of said county. The action was *assumpsit* brought in said county court, September 3, 1877, by the plaintiffs, Villie Black & Co., against the defendant, John C. Thomas, to recover eight hundred dollars for money advanced by the plaintiffs to the defendant between October 12, 1876, and April 21, 1877. The defendant pleaded *non-assumpsit* and payment and filed specifications of set-off against the account of plaintiffs, "for twenty and one half months' services as agent in soliciting tobacco from October 5, 1875, to May 20, 1877, at fifty-five dollars per month, one thousand one hundred and twenty-seven dollars and forty cents." Issues were joined on these pleas, a trial was had by jury and a verdict returned in these words: "We, the jury, find for the defendant and assess his damages at one hundred and seventeen dollars and fifty cents." The plaintiffs, before the jury had been discharged, moved the court not to record said verdict which motion the court overruled and the verdict was

recorded. The plaintiffs, then, moved the court to set aside the verdict and grant them a new trial, because the verdict was defective in form and contrary to law and the evidence, and also, because of new and material evidence discovered by them since the trial. In support of said motion they read two affidavits which entirely fail to show any diligence or facts to sustain said motion, and as they were not relied on in this Court, it is unnecessary to state their contents. The court overruled said motion and gave judgment for the defendant on the verdict. The plaintiffs duly excepted to the said rulings and judgment of the court and by their bill of exceptions all the material evidence is made part of the record.

The objection to the form of the verdict is untenable. It is claimed that under our statute it was the duty of the jury to find for the plaintiffs the amount of their claim and to find for the defendant the amount of his set-off, and if the latter exceeded the former the jury should specify that the verdict found for the defendant was the amount to which he was entitled in excess of the plaintiff's demand. This form of verdict may be more satisfactory and, perhaps, safer and better in practice.—Barton's Law Pr. 263. But such finding is not essential to the validity of the verdict. A finding which necessarily disposes of all the issues is a sufficient verdict, although it may not respond separately to each issue or fact presented by the pleading. *Lewis & Frazier v. Childers*, 13 W. Va. 1. In debt or *assumpsit*, where the defendant files an account of set-off, he is under our statute deemed to have brought a cross-action against the plaintiff for the amount of such account. And "on the trial of the issue in such case, the jury shall ascertain the amount to which the defendant is entitled and apply it as a set-off against the plaintiff's demand, and if the said amount be more than the plaintiff is entitled to, shall ascertain the amount of the excess, including principal and interest. Judgment in such case shall be for the defendant against the plaintiff for said excess, with interest from the date of the judgment till payment."—Code, chap. 126 sec. 9.

The verdict in this case was for a gross sum in favor of the defendant; and that, under the issues, was necessarily a find-

ing that the account of the defendant exceeded the amount to which the plaintiffs were entitled to the extent of that finding. The verdict is not, therefore, ambiguous or uncertain.—1 Rob. Pr. (old ed.) 355, 367; *Lanier v. Harwell*, 6 Munf. 79.

The only other question and the controlling one in this case is, did the court err in overruling the plaintiff's motion to set aside the verdict upon the ground that it was not warranted by the evidence?

It is always a delicate matter for a court and particularly an appellate court to interfere with the verdict of the jury on questions of fact. The courts of this State are peculiarly jealous of any encroachments by the courts upon the province of the jury which is made the judge of the weight and credit to be attached to the evidence, and it is only in cases of manifest abuse or plain departure from right and justice that the courts can interfere with the finding of the jury in such matters.—*State v. Thompson*, *infra*.

The rules of law as deduced from the decisions of the appellate courts of Virginia and of this State in such cases may be stated as follows:

I. The bill of exceptions must so present the case that the appellate court may be able to determine whether the jury has correctly applied the law to the facts in order that it may safely correct any error committed by the jury—the presumption being always in favor of the correctness of the verdict; and, therefore, unless the error complained of is made to appear affirmatively it will not be disturbed.

II. Where it is practicable *the facts* and *not the evidence* should be certified; but when there is a conflict or complication of the evidence so as to render it impracticable to certify the facts, the court may certify the evidence—*Read's Case*, 22 Gratt. 924.

III. Where the evidence only is certified the appellate court will not reverse the judgment unless, after rejecting all the conflicting parol evidence of the exceptor, and giving full faith and credit to that of the adverse party, the decision of the trial-court still appears to be wrong—*Newlin v. Beard*, 6 W. Va. 110.

IV. Where the matters certified in form as facts are in any

respect conflicting, such certificate must be treated as containing the evidence and not the facts; because facts cannot be conflicting, but are necessarily consistent with each other—*Read's Case*, *supra*.

V. The verdict will be set aside, when the issue involves facts only, if the facts proved clearly required a verdict different from that found by the jury—*Pryor's Case*, 27 Gratt. 1009.

VI. A new trial ought not to be granted on the ground that the verdict is contrary to the evidence, except in cases of plain deviation from right and justice; not in a doubtful case merely because the court, if on the jury, would have found a different verdict. Every reasonable presumption should be made in favor of the verdict of a jury fairly rendered, and such verdict ought not to be interfered with by the court unless manifest injustice and wrong has been done, or unless the verdict is plainly not warranted by the facts proved—*Blosser v. Harshbarger*, 21 Gratt. 216.

VII. Where some evidence has been given which tends to prove the fact in issue, or the evidence consists of circumstances and presumptions, a new trial will not be granted merely because the court is of opinion that the preponderance of evidence required a different verdict. To warrant a new trial in such a case the evidence should be clearly and plainly insufficient to warrant the finding of the jury—*Grayson's Case*, 6 Gratt. 712; *Sheff v. The City of Huntington*, 16 W. Va. 307.

VIII. These rules and principles apply *a fortiori* to an appellate court; for in that court, there is superadded the weight which must always be given to the verdict of a jury fairly rendered, that of the opinion of the judge who presided at the trial, which is entitled to peculiar respect upon the question of a new trial asked upon the ground that the verdict is not warranted by the evidence—*Burgh v. Shanks*, 5 Leigh 598.

IX. If the verdict tested by the foregoing rules is ascertained to be wrong and unwarranted, it is as much the duty of the trial-court to set aside such verdict and grant a new trial as it is to sustain the verdict when it does not contravene said rules; and while the appellate court ought not to set

aside the verdict with the same degree of facility as the trial-court, because in such court the weight of the opinion of the judge of the trial-court refusing to set it aside must be added to that of the jury in support of the verdict, still the action of the trial-court may be reviewed by the appellate court and in a clear and plain case it is the duty of that court to set aside the verdict and grant a new trial—*State v. Williams*, 14 W. Va. 851.

Applying these well settled rules of law to the case at bar, it seems to me the verdict of the jury cannot be sustained. The bill of exceptions purports to give all the material facts, but as there is some, though not very material, contradiction between the testimony of the plaintiffs and that of the defendant, I will treat it as a certificate of the evidence and not of the facts, that being the more favorable view for the defendant in error. The evidence certified so far as it is deemed necessary to state it is as follows:

The plaintiffs proved that they were commission merchants dealing in tobacco, having their ware-house and place of business in the city of Cincinnati, Ohio; that they had as their agent in West Virginia one J. D. Nalle whose business it was to visit the different counties of said State and solicit consignments of tobacco to their house and look after their interests; but that he had no authority to employ agents for them; that said Nalle died, on April 12, 1877, before the institution of this action; that the account sued on is for money advanced by them to the defendant on account of tobacco to be furnished by him to them, but that he failed to furnish them any tobacco or return the money so furnished; that each of the plaintiffs testified that they had never employed the defendant as their agent and never knew that he pretended to be such or that he asserted any claim against them for services until they demanded payment of the account sued on a short time before this action was brought; that on May 12, 1877, they wrote to defendant enclosing a statement of the account sued on and a blank note for the amount due thereon requesting him to sign the note and return it; that, on June 10, 1877, he replied by letter in which he says:

“I received all the money (principal) with which you have

me charged, but I have no credits for services which I certainly am entitled. Mr. J. D. Nalle came to me in the month of October, 1875, and employed me to solicit shipments for your house, and to attend to any and all business with which you might see fit to entrust me, and that I should be amply paid for such services; and under the contract I think, certainly, that I rendered services for which I am entitled to a credit on my account. I wanted to mention it last September when I was down with my tobacco: wanted to say something about it when I received my money from your book-keeper, but you being absent at the time, Mr. Nalle told me that he would see you himself for me; and he told me afterwards that he had seen you and arranged the matter all satisfactorily with you, and that I would be well paid."

The plaintiffs also proved that, prior to September 30, 1876, there were unsettled accounts between them and defendant which were on that day settled and a balance of three hundred and sixty-six dollars and forty-nine cents paid to defendant in full of the settlement by their book-keeper who testified that said settlement was satisfactory to the defendant, except that he claimed an item of thirty dollars and thirty-four cents for interest ought not to be charged to him because, as he said, he had done some service for Mr. Nalle for which the firm ought to knock off said interest; that Mr. Nalle was then present and said he would arrange the services with defendant, and the said item was not taken off; that about April 20, 1877, the witness presented to defendant the account sued on and he made no objection to it, said it was correct; that defendant asked witness to get him the position of agent for plaintiffs in the place of Nalle who had died, but he made no claim for services as agent or otherwise. By their attorney the plaintiffs proved that, a short time before the institution of this action, the defendant admitted to said attorney that he was owing the plaintiffs some money, but said that he had rendered some services which he would say nothing about if plaintiffs would appoint him their agent and, if not, he wanted pay.

The defendant as a witness on his own behalf admitted that the plaintiffs' account was correct, and testified, in support of his account of set-off, that he was, on October 5,

1875, hired by J. D. Nalle, the plaintiffs' agent, to solicit tobacco for plaintiffs; that Nalle said they would pay well, that they had paid Wm. Martin for similar services sixty dollars per month, but could not pay quite so much this year owing to hard times; that he acted under that employment *in parts* of Putnam, Mason, Jackson and Kanawha counties; that he was so employed up to May 20, 1877; that Nalle told him in October, 1876, that he had made arrangements and defendant would get his pay for services; that on July 21, 1876, he spoke to plaintiffs about his agency and they said it was all right and they would pay; that he never told plaintiffs' book-keeper that the plaintiffs' account was all right; that at the time of the settlement of September 30, 1876, he told said book-keeper the firm ought not to charge the interest item in their account, that he then claimed he ought to be paid for his services and that neither of the plaintiffs were present at said settlement. On cross-examination the defendant testified that he had not since September 30, 1876, shipped any tobacco of his own or any one else to plaintiffs; that during the time charged for in his account of set-off he taught school for over five months, and had during the whole of said time been a justice and had attended to his farm; that when asked to state what services he had rendered the plaintiffs, he said he had nothing to do with that as he claimed under his contract with Nalle and ought to have fifty-five dollars per month; that he had kept no account and could not tell how much time he had been occupied in actually attending to matters for Nalle or the plaintiffs. The defendant proved by other witnesses that said Nalle had in the fall of 1875, told defendant that he wanted him to solicit tobacco for plaintiffs and that they would pay him well for it; that Nalle recognized him as agent and that he attended to some matters of business for plaintiffs, prior to September 30, 1876. There was some other testimony, which I deem it unnecessary to state, as the above embraces all that is material on the question to be determined by this Court.

It is not intended, nor is it proper for this Court, as the case is now presented, to decide what, if any, services were rendered by the defendant for plaintiffs, or what part, if any,

of his account of set-off should be allowed him in this action. All that we intend to decide in that regard is, whether upon the evidence certified, the jury was justified in finding for the defendant one hundred and seventeen dollars and fifty cents in excess of the plaintiffs' demand of eight hundred dollars?

The correctness of the plaintiffs' account was admitted on the trial by the defendant; consequently, the only subject of controversy was the defendant's account of set-off, and the burden of proving this account was on the defendant. If we wholly disregard the parol evidence of the plaintiffs in error which is in conflict with that of the defendant in error, as we must do under the rules of law before stated, and concede that the jury was justified in finding that J. D. Nalle was authorized to employ the defendant, that he did employ him to solicit tobacco for the plaintiffs, and that he "acted under that employment *in parts* of Putnam, Mason, Jackson and Kanawha counties," it will still remain to be established by the evidence that the defendant had an express agreement for a *specified salary* per month, or that he rendered services for the plaintiffs which were reasonably worth the amount, say nine hundred and seventeen dollars and fifty cents, which the jury must necessarily have found in his favor by their verdict.

The only pretense of any express agreement for his services is, that the plaintiffs' agent, Nalle, told him he should be well paid and that the previous year the plaintiffs had paid Martin sixty dollars per month for similar services, but they could not pay quite that much this year. Certainly this was no agreement to pay defendant fifty-five dollars per month, or any other specified sum. The most that could be inferred from it would be that he would be well paid, and to give him some idea of what the plaintiffs would probably agree to pay, Nalle stated what had been paid Martin. It cannot, in my judgment, be justly considered anything more than an opinion of Nalle as an approximation of what the defendant might expect the plaintiffs would agree to pay. It was certainly no contract express or implied that they would pay fifty-five dollars per month. That the defendant so understood it is evident; for according to the testimony, at the settlement of September 30, 1876, Nalle was present and the

defendant then did not claim that he was entitled to any specified sum, but simply insisted, as he states himself, that in consideration of services rendered by him the plaintiffs ought to knock off the thirty dollars and thirty-four cents of interest charged to him. This occurred more than eleven months after his alleged employment when, at fifty-five dollars per month, the plaintiffs would then have owed him over six hundred dollars on his agreement. Is it reasonable, can it be even entertained for a moment, that having this large claim against the plaintiffs with Nalle present, the person with whom the alleged agreement had been made, to establish it if just, the defendant would have been so extremely liberal, I may even say so reckless, as to have surrendered the whole of it for thirty dollars and thirty-four cents? His pretension at that time was even less than this, for he did not then claim the thirty dollars and thirty-four cents as a sum to which he was of right entitled, but simply suggested as his opinion that for his services the plaintiffs ought to knock off this comparatively insignificant item. It was also proved and not contradicted by the defendant that a short time before this action was brought he admitted to the plaintiffs' attorney that he was indebted to the plaintiffs, but that he had done some services which he would say nothing about if they would appoint him their agent. At this time, according to the finding of the jury, the plaintiffs were indebted to him for services over nine hundred dollars. There is nothing in this case to justify the conclusion that if such had been the fact the defendant would have been willing to surrender such a large debt for such a small consideration or rather for no consideration. But the evidence which is absolutely conclusive of the defendant's understanding of the character of his engagement, is his letter of June 10, 1877, written to the plaintiffs but a few months before the bringing of this action. In this he asserts no claim whatever of any contract price for his services, but he simply intimates it and his language plainly indicates that he then believed he was for the first time notifying the plaintiffs that he had been employed or had any claim against them. He says, that he "had rendered services for which he *is entitled to a credit* on his account." There is no mention here of any

fifty-five dollars per month or other specified price ; but there is a clear admission that the value of his services were less than the account of the plaintiffs. He does not deny, but by strong implication admits, that he owes the plaintiffs and only suggests that he ought to have a credit for his services. He knew what the plaintiffs' demand was and if his account had exceeded theirs he would have said so, and not contented himself with a precatory claim for a credit. I think it may, therefore, be safely held that the evidence is plainly insufficient to establish any express agreement that the defendant was to have a fixed salary.

It is equally plain that he has failed to prove that any services he may have rendered the plaintiffs were reasonably worth the sum necessarily allowed him by the jury. When asked as a witness what services he had rendered and the value thereof he contented himself by stating that he had nothing to do with that matter, that he claimed under his contract. We have already seen that he failed to establish any contract price for his services. Having then no contract fixing the price and having declined to state what, if any, services he rendered or the value thereof, there was no evidence from which the jury could even estimate what he was entitled to under his account of set-off. The defendant it is true testified that "*he had acted*" (what this means we are not informed) "*under his employment in parts*" of certain counties named by him, but he states expressly that he kept no account and could not tell how much of the time charged for he was occupied in attending to the business of the plaintiffs. He states that during the whole of that time he was a justice, that he attended to his farm, taught school over five months and was otherwise engaged in affairs not connected with the business of the plaintiffs. In fact he did not offer to show by his own or any other testimony, that he did anything whatever for the plaintiffs after September 30, 1876, but on the contrary he admitted that he had not since that date shipped any tobacco of his own or any one else to the plaintiffs. Notwithstanding this absence of proof and admission, the defendant has charged and the jury has evidently allowed him for services subsequent to that date ; for giving him the price he claims for the time prior to that date it would fall far short of the sum

allowed him by the jury. Indeed, the inference from the testimony of the defendant himself seems to be rather that he did not than that he did render services for the plaintiffs during any or the greater part of the time for which he has charged them. It necessarily follows, therefore, that the defendant having failed to establish any express agreement for a specific salary, or furnish any sufficient evidence of the character, extent or worth of his services from which the jury could properly estimate their value—certainly none to warrant the finding of a sum in excess of the plaintiffs' demand, the verdict was clearly and plainly against the evidence.

I am, therefore, of opinion that the county court erred in overruling the plaintiffs' motion to set aside the verdict and grant them a new trial, and that the circuit court erred in affirming said judgment, and that the judgment of the circuit court must be reversed with costs to the plaintiff in error. And this Court proceeding to pronounce such judgment as the said circuit court should have rendered, it is considered that the said judgment of the county court be reversed with costs to the plaintiffs in error in that court, that the verdict of the jury be set aside and a new trial granted, the costs of the former trial to abide the final judgment in the action; and this case is remanded to the said circuit court to be therein further proceeded in according to law.

THE OTHER JUDGES CONCURRED.

JUDGMENT REVERSED. CASE REMANDED.

WHEELING.

CASANOVA v. KREUSCH.

Submitted June 8, 1882—Decided June 30, 1883.

(*WOODS, JUDGE, Absent.)

A writ of error and *supersedeas* having been dismissed because of the failure of the plaintiff in error to give a new bond with good and sufficient security, the sureties in the first bond being insol-

*Case submitted before Judge W. took his seat on the bench.

vent, the plaintiff in error cannot after such dismissal of his writ of error be awarded a writ of error without *supersedeas* on giving the bond required by law, and if such writ of error has been granted it will be dismissed as improvidently awarded. (p. —.)

Writ of error and *supersedeas* to a judgment of the municipal court of Wheeling, rendered on the 11th day of October, 1878, in an action at law in said court then pending, wherein Alois Casanova was plaintiff, and Peter Kreusch was defendant, allowed upon the petition of said Kreusch.

Hon. G. L. Cranmer, judge of the municipal court of Wheeling, rendered the judgment complained of.

GREEN, JUDGE, furnishes the following statement of the case :

In July, 1868, Alois Casanova brought an action on the case against Peter Kreusch in the municipal court of Wheeling for a certain libel. The declaration was demurred to, and many exceptions taken to instructions refused or granted by the court at the trial. The jury rendered a verdict for the plaintiff for one thousand dollars, and the court entered up a judgment pursuant to the verdict and refused to grant a new trial. A writ of error and *supersedeas* was allowed by this Court to this judgment, on the petition of the plaintiff assigning fifteen errors in the case. The record was printed and the cause argued and submitted to this Court for decision, but before any decision was announced the defendant in error moved this Court to require the plaintiff in error to furnish a new bond with good and sufficient security, and in default thereof to dismiss the writ of error and *supersedeas* theretofore allowed, upon the ground of the insufficiency of the security on the bond theretofore given. Reasonable notice was given of this motion, and it was sustained by affidavits showing, that the sureties had become insolvent since the giving of the bonds. This Court sustained this motion and set aside the order awarding the writ of error made theretofore, and ordered the plaintiff in error to execute within sixty days before the clerk of the municipal court of Wheeling bond with good personal security in the penalty of

two thousand dollars conditioned according to law, and on his failure to do so the writ of error and *supersedeas* theretofore awarded should stand dismissed from and after the expiration of said sixty days, and the costs of this motion were decreed to the defendant in error against the plaintiff in error.

The plaintiff in error then moved this Court, that this order be so modified as to allow him a writ of error only without *supersedeas*, but this Court refused to make this modification of said order. He then moved this Court to set aside this order and to dismiss the writ of error and *supersedeas* theretofore awarded at his costs, which this Court did adding to its order, that this order of dismissal is without prejudice to the right of the plaintiff in error to apply for and obtain a writ of error from said judgment in the manner and within the time prescribed by law. But at another day of the same term of this Court these orders were all set aside, and this Court took time to consider of the proper order to be made on said motions. And at the next term of this Court all of said motions were overruled, except the first motion made by the defendant in error, and the said order that was originally made in the case was again made, except that the writ of error and *supersedeas* was to stand dismissed from and after twenty days instead of sixty days. This change being made at the suggestion of the counsel for plaintiff in error, who announced that the bond required could not be given. After the writ of error and *supersedeas* had been dismissed because of the failure of the plaintiff in error to give such new bond and security as was required, and at a subsequent term of this Court the said Peter Kreusch by his attorney presented his petition accompanied by the record in said case, and the usual certificate of counsel, praying a writ of error to said judgment; and this Court allowed the writ of error prayed for, the same not to take effect till the petitioner or some other person shall have given before the clerk of the municipal court of Wheeling bond with good personal security in the penalty of one hundred and fifty dollars conditioned according to law.

When this writ of error was awarded, this Court announced, that it would consider and at another term of the Court

determine, whether said writ of error should not be set aside as improvidently awarded, the Court not being then prepared to say, whether after the dismissal of a writ of error and *supersedeas*, because of the failure of the plaintiff in error to give a new bond with security, this Court could properly as a matter of right award a writ of error without a *supersedeas*. This bond in the penalty of one hundred and fifty dollars required on awarding the writ of error without *supersedeas* has been given, and this case is now before this Court for us to determine first, whether the writ of error should not be dismissed as improvidently awarded, and if not, then to consider and determine the case on its merits.

W. P. Hubbard and *Robert White* for plaintiff in error.

Henry M. Russell and *Louis F. Stifel* for defendant in error.

GREEN, JUDGE, announced the opinion of the Court :

If a plaintiff brings a suit in a common law court of original jurisdiction and fails to prosecute it, and he is nonsuited or his case is dismissed, such a dismissal does not hinder him from again bringing a like suit for the same cause of action. The law gives to every one a remedy when his legal rights have been invaded, and his failure to prosecute his suit to enforce such right as he ought to do, the common law courts hold ought not to deprive him of his rights or debar him of a right to institute another suit, as the merits of his case have never been passed upon by any court. But in case his rights have been passed upon by a court of competent jurisdiction, and he deems himself injured by the decision of the court, and obtains a writ of error with or without *supersedeas* to have the judgment of this Court of original jurisdiction reviewed, and fails properly to prosecute his writ of error, and after due notice and consideration the appellate court dismisses his appeal or requires him to give a new bond with approved security, such as the defendant in error has a right to require, the first bond being worthless because of the insolvency of the obligors on it, and he fails to give such new bond and his writ of error is dismissed, it

is by no means clear, that he ought as a matter of right to be awarded another writ of error either with or without a *super-sedeas*, for he has already had his rights passed upon and decided by the court of original jurisdiction. And though the law extends to him a right to have this judgment of the court reviewed, yet this right is not as in the case of a suit at common law in the first instance an absolute right, but is one subject to such conditions and restrictions as the statute-law has properly put upon it; and if his writ of error has been dismissed because of his failure to comply with these conditions, and restrictions inserted in the law for the benefit of the defendant in error, who having the judgment of the court below in his favor is *prima facie* presumed to have the right on his side, it seems to me, that the plaintiff in error ought not to have as of right a second writ of error awarded him to the injury and annoyance of the defendant in error, except in such case as the statute-law expressly or by fair implication authorizes such granting of a second writ of error.

Thus by our statute law, see chapter 171 of Acts of 1872-3, "If the appellant or plaintiff in error fails within six months, after his case has been docketed in the Court of Appeals, to deposit with the clerk a sufficient amount to pay for the printing of the record, he is decreed to have abandoned his appeal, and the same shall be dismissed." Yet though thus dismissed for this cause, a second writ of error would be awarded the plaintiff in error as a matter of course, because our said statute expressly provides, when a case has been thus dismissed for failure, to print or to deposit the money within six months with the clerk to have the record printed, that "the appeal may be renewed at any time within five years from the date of the judgment, order or decree appealed from." But when no provision of statute-law can be found thus expressly or by fair implication authorizing the granting of a second writ of error, after one has been dismissed by the appellate court, the plaintiff can not as of right have awarded to him a second writ of error. That our law did not intend to permit after the dismissal of a writ of error a second writ of error to be awarded as a matter of course, except in particular classes of cases, such as we have pointed

out, seems to me to be a necessary conclusion from the phraseology of the bond required to be given by the plaintiff, when the first writ of error, if accompanied by a *superse-deas*, is awarded. The condition of the bond is, "to perform and satisfy the judgment, decree or order or any part thereof, proceedings on which are stayed, in case said judgment, decree or order, or such part thereof be affirmed, or the appeal, writ of error or *superse-deas* be dismissed." This would seem clearly to indicate, that if the plaintiff in error himself dismissed his writ of error and *superse-deas*, or if it was dismissed by the court for want of prosecution, except in cases where it was otherwise provided, no second writ of error was to be awarded as of course; for by the terms of the bond the plaintiff and his sureties were on the first dismissal of the writ of error bound to perform and satisfy the judgment of the court below; and of course it was not contemplated, that after such dismissal a second writ of error should be awarded, whereby perhaps this judgment of the court below might be reversed, excepting in such cases as the statute-law by express provision or fair implication permitted and required such second writ of error to be awarded, and in that case the sureties in the bond given on the first writ of error could not be held responsible, if the judgment below was reversed on the hearing of the second writ of error.

This conclusion, that the plaintiff in error can not except by statutory provisions be awarded as of right a second writ of error, where his first writ of error has been dismissed for want of prosecution or because of his failure to give a new bond with sufficient security when required so to do after a full hearing of the matter by the appellate court, is sustained by the decided weight of authority. In New York it seems to have been the practice of the appellate court to grant a second writ of error when the first had not been dismissed on its merits, but because of its want of prosecution by the plaintiff in error. See *Langley v. Warner*, 1 Com. 606; *Kelsey v. Campbell*, 38 Barb, 238. But from what is said by Judge Duer in *Watson v. Husson*, 1 Duer 252, I infer, that this practice was adopted because the bonds given, when a writ of error was awarded in that State, only provided, that the obligors should be responsible in case the judgment ap-

pealed from was affirmed, and not as do the bonds given under our statute "where the writ of error is dismissed."

The judge in this case says: "The bond which the revised statutes required to be given when a writ of error was brought, which was intended to operate as a stay of execution, not only bound the parties to satisfy the judgment in case it should be affirmed, but also in case the plaintiff in error should fail to prosecute the writ or the same should be quashed or discontinued, (2 R. S. 59 § 28), and why these additional and very significant provisions have been omitted in the Code we have been unable to discover, and are at loss to imagine. We cannot believe, that they were rejected by the framers of the Code as superfluous, in the belief that they were all virtually comprehended in the affirmance of the judgment. If they really intended, that the undertaking upon an appeal should be construed as largely as the bond upon a writ of error, it is to be regretted that they have not expressed themselves in terms that could enable us to carry their intention into effect. We can not depart so far from all sound and safe rules of interpretation as to adopt a construction, which is plainly inconsistent with the settled and sole meaning of the words they have chosen to employ. To affirm a judgment is by the judicial sentence of an appellate court to declare its validity, and it is a legal solecism that a judgment has been affirmed, when the question of its validity is exactly that which the appellate court refused to consider. The court of appeals has said, that the appeal should be dismissed, but as it has not said that the judgment is either valid or erroneous, we have no more right "to say it has been affirmed than that it has been reversed." This opinion was delivered in a suit upon an appeal bond.

It is obvious, that an exactly opposite conclusion would have been reached had the suit been upon the bond given in the case now before us on the granting of the first writ of error and *supersedeas*; for it not only provided, that the obligors should be responsible if the judgment below was affirmed, as the New York bond did, but also if the "writ of error and *supersedeas* were dismissed." This decision I regard then as not contrary to the conclusion, which I have reached, but the reasoning of it has not been regarded as

satisfactory even where the condition was, that the obligors should be responsible if the judgment below was affirmed, and nothing was said in the bond about the obligors being responsible in case the writ of error was dismissed. Thus in *Rairth v. Light et al.*, 15 Cal. 327, C. J. Field says in speaking of this opinion of Judge Duer: "And the learned justice observed, that to affirm a judgment was to declare by a judicial sentence of the appellate court its validity, and that it was a legal solecism to say, that a judgment has been affirmed when the question of its validity was exactly that which the appellate court refused to consider. With the highest respect for the opinion of the learned justice, we think the solecism is not so apparent, but on the contrary, the judgment may in the contemplation of the statute be said to be affirmed, when by any action of the appellate court it is no longer open to review, whether that be either by dismissal of the appeal or by a direct decree of affirmance. See *Harrison v. Bank of Kentucky*, 3 Marsh. 375; *Osborn v. Hendrickson*, 6 Cal. 175."

The Kentucky case referred to, reported in 3 J. J. Marshall 375 was, like the New York case above quoted, a writ of error from a judgment in a suit on an appeal bond, in which the obligors "bound themselves to pay, &c., in case the judgment shall be affirmed in said court of appeals." The appeal had been dismissed by an order of the court for failure to prosecute it by the appellant, with damages and costs, and thereupon suit was brought on this appeal bond. The court of appeals decided, that such suit should be sustained, and that the conditions of the bond had been broken; such conditions being equivalent to saying, "unless the judgment is reversed by the appellate court."

In the California case, from which we quoted above, 15 Cal. 324, the court held: "The cases in which dismissal of an appeal will not operate as a bar to a second appeal, and hence not as an affirmance of the judgment below, are those where the dismissal has been made on some technical defect in the notice of the appeal, or the undertaking or the like. The bar operates when the dismissal is for the want of prosecution, and the order is not vacated during the term, or the dismissal is on the merits." This decision is in accord with

the other cases decided in California. See *Osborn v. Hendrickson*, 6 Cal. 175; *Chamberlain v. Reed et al.*, 16 Cal. 208.

But in opposition to these decisions it was held in *Marshall v. The Milwaukee & St. Paul Railroad Co.* 20 Wis. 676, that an appellant whose first appeal had been dismissed for want of prosecution, may take a second appeal, as of right, within the time allowed by the statute for appealing. The court however took this position hesitatingly. The court say: "The first appeal was dismissed under the rules of this court, because the appellant had not caused a proper return to be filed, and also had neglected to serve his printed cases. It will be borne in mind, that the record was never in this court, but remained in the court below till the second appeal was taken. An appeal now in a common law case, performs the office of a writ of error under the old practice. The former statutes, R. S. 1849 ch. 104 § 11, as well as the present one, ch. 139 § 36, permitted a second writ of error on the dismissal of the first; and in analogy to practice we are inclined to hold a party may take a second appeal, when the former has been dismissed under the rules." The New York cases are referred to as countenancing such practice, and the case of *Martinez v. Gallardo*, 5 Cal. 155 is also referred to as having decided, that "where an appeal is dismissed for want of a proper bond, and no final judgment has been rendered, a second appeal may be taken. Although these authorities are not in point, yet" say the court, "they clearly sustain the view, that the first appeal taken in this case did not operate to bar a second appeal."

Though there be some conflict among these decisions, the decided weight of authority sustains the view, which I have expressed, that under our law, if a case is dismissed for want of prosecution, or because a party fails to give a new bond with security, after the same has upon mature consideration been dismissed by this Court, such party cannot as of right have a second writ of error. This too is the conclusion, which we would draw, from the decisions in the court of appeals of Virginia, which are binding upon us as authority. It has been in these cases held, that where a suit has been dismissed by the appellate court for want of prosecution, it cannot as of right be redocketed at a subsequent term; but

if upon a rule or notice it be shown, that the case was dismissed by fraud, accident or mistake, the case may be re-docketed at a subsequent term of the court. See *Thornton v. Carbin*, 3 Call 221; *Id.* 232; *Craigien et al. v. Thorn et al.* 3 H. & M. 269; also *Emory et al., paupers, v. Erskine*, 7 Leigh 267.

In *Sites et al. v. Weiland*, 5 Leigh 80, an appeal was taken under the provisions of the R. Code of 1819, whereby the appellant's appeal-bond was with condition to satisfy and pay the amount, which had been recovered in case the same be affirmed. See ch. 66, § 50, p. 206, and ch. 64, § 11, p. 192, and § 19 of same chapter. Sec. 13 of ch. 64, p. 193, provided: "In case the transcript of a record in any appeal, writ of error or *supersedeas* shall not be filed with the clerk of said court within six calendar months after the same shall be granted, such appeal, writ of error or *supersedeas* shall be dismissed unless good cause be shown to the contrary." And section 20 of said chapter 64 provided: "After the dismissal of an appeal, writ of error or *supersedeas* in the court of appeals no appeal, writ of error or *supersedeas* shall be allowed." After this appeal and *supersedeas* was awarded, the Legislature in February, 1825, passed an act authorizing appellate courts to allow writs of error and appeals upon bond and security being given for the costs of the writ of error or appeal only; provided such writ of error or appeal should not operate as a *supersedeas* to the judgment or decree. See Supp. of R. Code, ch. 98, p. 127. In June, 1827, after a rule duly entered and served on the appellants, the court made an order, that unless other and sufficient security should be given before July 1, 1827, the appeal should stand dismissed, as an act of the day, on which the order was made. This bond was not given, and at a subsequent term, after this dismissal for this cause, the appellants presented a petition asking, that the appeal be reinstated or that a new appeal should be allowed upon the appellant giving bond and security for costs only, so that the appeal should not operate as a *supersedeas* to the decree. But the court held, that the appellants are not entitled to have the appeal reinstated, or to have a new appeal allowed on giving security for cost only, and taking the appeals without a *supersedeas* to

the decree. The court say: "It would be mischievous, if after the dismissal of the appeal upon a rule for security and failure to comply with the rule, the appellant should be permitted to come in at any future day with his security and ask for reinstatement of his appeal, or for a new appeal upon the ground, that he is now able and ready to give the security. Such a proceeding would utterly frustrate the order of dismissal; for the order appoints a day certain to give the security, which would be futile, if the security may be given at any time the party pleases." These provisions of the Code of 1819 were preserved in the Code of 1849, but the bond required was changed, so that the condition was to satisfy the judgment in case it was affirmed, or in case the writ of error was dismissed. See Code of 1860, ch. 182, §§ 21 and 27.

In the Code of W. Va. of 1869, see ch. 135, § 3, the condition of the undertaking was again made similar to that in the bond. Great changes were made in the manner of taking appeals, by the Legislature of this State in 1863 and subsequent legislation, which changes were continued in the Code of West Virginia, chapter 135, which it is not deemed necessary to particularly point out, they being familiar to the profession. Under these changes instead of appeals being taken to the Supreme Court of Appeals only for errors assigned by the appellant in a petition, when the court on such petition deem it proper to award an appeal, were taken of right on the appellants filing an undertaking in the clerk's office of the court below. The condition of this undertaking is set out in section 3, chapter 135 of Code of West Virginia, page 639. It provided: "That if the judgment, decree or order appealed from is affirmed, the appellant shall abide by and perform the judgment, decree or order of affirmance, and pay to the opposite party or to any person injured all such costs and damages as they or either of them may incur or sustain by reason of said appeal. If such party do not desire a stay of execution, such undertaking shall be to the effect only, that he will pay the costs of the appeal in case the judgment, decree or order be affirmed." This undertaking differed from the bond, which under the Code of Virginia was to be given upon an appeal,

writ of error or *supersedeas* being awarded, principally in the omission of the provision, that the appellant was to be responsible not only "in case the judgment, decree or order should be affirmed," but also if the appeal, writ of error or *supersedeas* should be dismissed." See Code of Virginia of 1860, ch. 182, § 21, p. 748.

But from the decisions in Kentucky and California, to which I have referred, the inference would be, that the omission in our Code to say in express words, that the appellant should be responsible if his appeal was dismissed would not really modify this undertaking, as such dismissal would be regarded as substantially within the meaning of the law an affirmance. But we need not examine the provision of the Code of West Virginia of 1869 with a view of definitely determining this question, as by the Acts of 1872-73 chapter 17 p. 60, the mode of taking appeals, which had always prevailed in Virginia was restored, and the condition of the bond required, (see section 14,) was restored to just what it had been under the Code of Virginia of 1849, and it provided as it still does for the responsibility of the parties to the bond, not only if the judgment or decree was affirmed, but also if the appeal or writ of error was dismissed. There is it is true no express provision now, that if the appeal or writ of error is dismissed it shall not be reinstated. But from what we have said it follows, that such reversal of an appeal or writ of error after it has been dismissed is forbidden in effect by this condition of the bond, that the parties to it shall be responsible if the appeal or writ of error is dismissed. For they could not be so responsible if such second appeal or writ of error was allowed as of course, for if upon it the judgment or decree below was reversed, they could not surely be held liable for the amount of his judgment or decree. This second appeal or writ of error is by the terms of our present law to be granted as of course, if the dismission be for one specified cause, that is a failure to print the record or to deposit with the clerk of this Court a fund sufficient to print the record within six months after the docketing of the case in this Court. Except in this respect there has been no substantial change in our law since 1819 except between the years 1863 and 1873, and the policy introduced during these years, if

it has any effect on the question before us, was changed by the acts of 1872-73, and the old and long established policy of Virginia was again restored. My conclusion therefore is, that where a writ of error or appeal has been dismissed because of the failure of the plaintiff in error or the appellant to give a new bond with good security when required by this Court, the party is not entitled to a second writ of error or *supersedeas*; and therefor the writ of error, which we awarded in this case, was improvidently awarded and must be dismissed.

JUDGES JOHNSON AND SNYDER CONCURRED.

WRIT OF ERROR DISMISSED.

WHEELING.

PERRY v. HORN *et al.*

Submitted June 20, 1882—Decided June 30, 1883.

(*WOODS, JUDGE, Absent.)

1. If an appeal or a writ of error has been twice dismissed by this Court because of the failure of the appellant or the plaintiff in error to have the record printed, or to deposit the requisite money with the clerk of this Court to have the record printed within six months after the case has been docketed in this Court, the appellant or the plaintiff in error cannot have a third appeal or writ of error awarded to him. (p. 736.)
2. A case is held to be docketed in this Court within the meaning of the law requiring the printing of the record, or the deposit of the money with the clerk for that purpose within six months after the case is docketed in this Court from the day, on which the clerk of this Court issues the summons in the case. (p. 736.)
3. A case which has been dismissed by this Court may at a subsequent term be reinstated, if the case was dismissed because of surprise, accident or mistake. But such equitable considerations cannot be considered by this Court in deciding, whether when a case has been previously dismissed once or oftener another writ of error or appeal can be granted. (p. 740.)

*Case submitted before Judge W. took his seat on the bench.

Appeal from and *supersedeas* to a decree of the circuit court of the county of Wood, rendered on the 14th day of April, 1879, in a cause in said court then pending, wherein John W. Perry was plaintiff, and S. J. Horn and others were defendants, allowed upon the petition of said S. J. Horn.

Hon. J. M. Jackson, judge of the fifth judicial circuit, rendered the decree appealed from.

GREEN, JUDGE, furnishes the following statement of the case:

In July, 1878, J. W. Perry brought a suit in chancery in the circuit court of Wood county to subject certain real estate of the defendant, S. J. Horn, to the payment of a certain judgment and decree against S. J. Horn, and on April 19, 1879, after various proceedings in the court and a report of the commissioner had been made pursuant to a decree of the court, the court ascertained and determined the liens against the real estate of S. J. Horn and their priorities; they being arranged by the court in nineteen classes. And the rents and profits of his real estate not being sufficient to pay the same in a reasonable time, the court among other things decreed, that unless these liens were paid within thirty days, that certain commissioners named should sell in the manner prescribed certain real estate of S. J. Horn. From this decree S. J. Horn obtained from a judge of this Court, in vacation, an appeal and *supersedeas* to the portion of the decree ordering the sale to be made on the 12th day of May, 1879. The penalty of the bond was fixed at one thousand seven hundred dollars. On June 17, 1879, a motion was made by the appellee to require the appellant, S. J. Horn, to execute a *supersedeas-bond* in a larger penalty, which motion was based on the fact, that the penalty of the bond was insufficient to cover the rents and profits pending the appeal. This Court heard the arguments of counsel for both the appellant and appellee upon this point, and being of opinion, that the obligors in such *supersedeas-bond* would not be responsible for the value of the rents and profits received by the appellant pending such appeal, refused to increase the penalty of said bond, and on June 26, 1879,

overruled said motion. On April 24, 1880, the appellee, John W. Perry, moved this Court to dismiss the appeal and *supersedeas* in this cause on the ground, that although more than six months had elapsed since this cause was docketed in this Court, the appellant had failed to deposit with the clerk of this Court a sum sufficient to pay for printing the transcript of the record as required by law. After hearing the parties by their counsel this Court on May 4, 1880, sustained this motion, and dismissed the appeal and *supersedeas*, but without prejudice to the rights and privileges of the appellant thereafter to apply for and obtain an appeal from said decree and a *supersedeas* to a portion of said decree in the manner and within the time prescribed by law.

On the 8th day of May, 1880, the appellant again presented his petition for a like appeal and *supersedeas* to a judge of this Court, in vacation, and it was again awarded, the penalty of the bond again being fixed at one thousand seven hundred dollars. The appellant, S. J. Horn, again failed to deposit with the clerk of this Court, within six months after the cause was again docketed in this Court, a sum sufficient to pay for printing the transcript of the record and on November 27, 1880, the appellee moved this Court to dismiss this cause for this reason. On December 18, 1880, after hearing the arguments of counsel and maturely considering the evidence presented on each side, the Court sustained the motion and dismissed this cause a second time at the cost of the appellant. There was in this order no provision such as had been inserted in the former order, that this dismissal was to be without prejudice to the right of the appellant thereafter to apply for and obtain a like appeal and *supersedeas* to said decree. On March 12, 1881, the said S. J. Horn, by his counsel, again for the third time filed his petition asking for an appeal from the said decree. This petition was presented to this Court in session, and as it asked for an appeal only and not for a *supersedeas*, this Court awarded the appeal, fixing the penalty of the bond at three hundred dollars, and stating at the time, that it doubted its authority to allow this third appeal, but that it would be allowed, and if when the case was submitted to this Court and the law examined this Court reached the conclusion, that it ought not

to have granted this appeal, it would then be dismissed as improvidently awarded; and this cause was argued and submitted to this Court on June 19, 1882.

James Hutchinson for appellant.

W. L. Cole for appellee.

GREEN, JUDGE, announced the opinion of the Court:

The first enquiry in this case is, whether the appeal should not be dismissed as improvidently awarded. We have decided during the present term of this Court in *Alois Cusanova v. Peter Kreusch*, *supra*, that where a writ of error and *supersedeas* has been dismissed because of the failure of the plaintiff in error to give a new bond with security when required so to do by this Court, the sureties in the first bond being insolvent, the plaintiff in error can not be awarded a writ of error without *supersedeas* on giving the bond required by law, and if this be done the writ of error will be dismissed as improvidently awarded. And the reasoning on which said conclusion was reached would forbid the granting of any writ of error or appeal, whether with or without *supersedeas* whenever this Court has dismissed for want of prosecution a former writ of error or appeal, except where it had been dismissed without prejudice to such second writ of error or appeal under the express provision of some statute, or where such second appeal or *supersedeas* was allowable under a fair construction of some statute-law. Chapter 172 of Acts of 1872-3, page 521 provides, "that should the appellant or plaintiff fail within six months after his case has been docketed in the Court of Appeals, to deposit with the clerk a sufficient amount to pay for the printing of the record, he shall be deemed to have abandoned his appeal and the same shall be dismissed; but it may be renewed at any time within five years from the date of the judgment or decree appealed from." Of course, when the requisite money has not been deposited in the required time or the record printed, this Court under this law as a matter of course granted a second writ of error or appeal. The time allowed, within which to deposit this money for the printing of the record, is six

months after the case has been docketed in this Court. This Court has decided, that the issuing by our clerk of the process is the time of docketing meant by the law.

We are now to determine, whether this law also authorizes this Court to issue a third or an indefinite number of appeals or writs of error from the judgment or decree, when writs of error or appeals have been repeatedly dismissed by the Court because of the failure to deposit with the clerk a sufficient sum to pay for the printing of the record within six months after the case is docketed.

The statute says, that "the case may be renewed at any time within five years from the date of the judgment, order or decree appealed from." Does this mean that it may be renewed once after such dismissal, or that it may be renewed an indefinite number of times provided only that the last of such renewals is within five years from the rendition of the judgment or decree appealed from? The language of the act would admit of either interpretation, and the construction to be put upon it must be that which most accords with the spirit of our laws, as interpreted by the Court in reference to the granting or refusing appeals or writs of error after a case has been dismissed by this Court for want of prosecution. The general spirit, which has pervaded the law in this country has been in opposition to the granting of a second appeal or writ of error, when the first has been dismissed for want of prosecution. This is shown by the decisions of the courts, some of which were reviewed in *Casanova v. Kreusch*, *supra*. They need not be again reviewed, but it will suffice to say, that second appeals or writs of error, after the first has been dismissed, are refused in California, Kentucky, Virginia and in West Virginia, except where the case comes within the provision of the statute-law, which we are considering. See *Karth v. Light*, 15 Cal. 327; *Osborn v. Hendrickson*, 6 Cal. 175; *Chamberlain v. Reed et al.* 16 Cal. 208; *Harrison v. Bank of Kentucky*, 3 J.J. Marshall 375; *Sites et al. v. Wieland*, 5 Leigh 80; *Casanova v. Kreusch*, *supra*.

It is true, that a different course was and perhaps is pursued in New York. See *Langley v. Warner*, 1 Com. 606; *Kelsey v. Campbell*, 38 Barb. 238; *Watson v. Husson*, 1 Duer 252. And in one case in Wisconsin, the court with apparent

reluctance followed the New York practice. The decided weight of authority as well as of reason is in accord with our practice, and in *Casanova v. Kreusch*, *supra*, it is shown, that the uniform practice in Virginia certainly since 1820 and probably for an indefinite time before that has been to refuse a second appeal or writ of error, when the first one had been dismissed for want of prosecution; and such was the practice in all cases in this State, it is believed, till the passage of the statute-law, which we are now to construe. It is true, that it may be supposed, that the law in our Code of 1869 by its provisions modifying the condition of the undertaking upon an appeal raises some doubt, as to whether this long continued practice should be preserved. It omitted the provision in the old bond, that the obligors should be responsible, if the appeal was dismissed, and retained only the condition, that they would be responsible, if the judgment below was affirmed. But according to the Kentucky and California cases above cited this was really no change in their obligation. These cases are reviewed in *Casanova v. Kreusch*, *supra*; and I concur in their conclusion, that a responsibility, when the judgment or decree below is affirmed, is the equivalent of a responsibility, if the judgment or decree is affirmed, or the appeal or writ of error is dismissed for want of prosecution, when the statute does not authorize a second appeal, and therefore that no change was introduced into our law either in the Code of Virginia of 1849 or in that of 1869, so far as the responsibility of the obligors in an appeal-bond is concerned, except that produced by permitting a second appeal or writ of error when the first is dismissed, because funds have not been provided for printing the record within six months. For these changes in our law in reference to the conditions of appeal-bonds, see R. C. 1819 ch. 66 § 50 p. 206; ch. 64 §§ 11, 19 p. 192, also ch. 64 § 13 p. 193; Code of Virginia of 1860 ch. 182 §§ 21, 27, and Code of W. Va. ch. 153 § 3. For a full statement of these changes in the language of our statute-law in reference to the conditions of appeal-bonds, see *Casanova v. Kreusch*, *supra*. The conclusion there reached is, that though the language of this condition of an appeal-bond has been thus changed, there has been no change in its effect and meaning. It is possible that

the provisions of statute-law between 1863 and 1873, during which time great changes were effected in reference to appeals, and the mode in which they were taken, may possibly have had some effect during these ten years on the question, which we are considering. But we deem it unnecessary to examine this point, as in 1873 the old practice with reference to the obtaining writs of error and appeals, which had been followed in Virginia for an indefinite time was again restored, and is now and ever since has been in force.

Our conclusion is, that the general law of this State as well as the State of Virginia is and always has been, with possibly an exception for a brief time, that when a writ of error or appeal is dismissed for want of prosecution a second writ of error or appeal will not be granted, and that the statute which we are construing introduced for the first time an exception to this general rule. This exception is, that if the dismissal is for want of prosecution because of the failure to provide for the printing of the record within six months after the case is docketed in the appellate court, "the case may be renewed at any time within five years from the date of the judgment, order or decree appealed from." This being an exception to a long established rule of universal application, it ought to be construed with strictness, and as these words of the exception are fully met by the allowance of one other appeal or writ of error, when the case has been dismissed because of such failure to furnish funds to print the record, it seems to me we should construe this statute as allowing the award of only a second appeal or writ of error in such a case, and that we would be extending this exception too far if we were to allow in succession a third or fourth or an indefinite number of appeals or writs of error in such case. The language of the statute does not fairly admit of such a construction, when we consider the condition of the law when this statute was enacted. There is a special reason applicable to Virginia and West Virginia, which should prevent the courts from allowing an indefinite number of appeals or writs of error, when there are dismissions of former appeals and writs of error for want of prosecution, that is, the construction, which has been put by the courts of Virginia and West Virginia on the bonds given in these

States on the awarding of an appeal or writ of error with *supersedeas*.

These courts have held, that when the sale of land has been ordered and is stayed by the *supersedeas* the *supersedeas-bond* does not render the obligors in this bond responsible for the rents and profits of the land pending the appeal. See *Cardwell v. Allen, trustee*, 28 Gratt. 184; *Beard v. Arbuckle et al.* 19 W. Va. 149. It would be onerous on the appellants in a suit, where lands have been ordered to be sold by the court below to pay these debts, and it is in value insufficient to pay them, and there is no other way, in which they can be paid, if the appellant the owner of the land in possession by taking several appeals and writs of *supersedeas* after repeated dismissals of his appeals for failure to provide funds for the printing of the record, could keep possession of the land for five years, after the decree has been entered for its sale, without any one being accountable for the rents and profits. The case before us is an example of the hardship, which the appellees would sustain if we were to construe our statute as permitting an appellant to renew his appeal and *supersedeas* a third time or oftener, after it had been twice before dismissed, because of the failure of the appellant to furnish the requisite funds to print the record.

On the motion to increase the *supersedeas-bond* formerly made in this case it was proven, that a fair rent of the real estate in the possession of the appellant, and which the court below had decreed to be sold to pay debts of appellees, was not less than three thousand dollars per annum, and that the property was liable to be destroyed by fire and was insured for less than one third its value. It was also shown, that the appellant was probably insolvent, and that the property ordered to be sold, would not probably pay his debts, and that the probable loss incurred by the appellees, if the decree of the court below should be ultimately affirmed, would probably be three thousand dollars a year at least, so long as the *supersedeas* to said decree of sale continued in force. For the securities in the *supersedeas-bond* were not I presume liable for the rents and profits of this property, nor for any loss by fire should any occur. This being the state of the case, it would appear unjust to the appellees to permit the

appellant to continue the *supersedeas* for five years before the case was submitted to this Court for decision, by repeated applications for appeals and *supersedeases* every six months, arising from his failure to print the record, or to furnish money wherewith to have it printed.

It is true, that the decision of this Court in *Beard v. Arbuckle et al.*, 19 W. Va. 135, that the appellees while the case was pending in this Court on an appeal and *supersedeas* might have a receiver appointed in certain cases relieves the hardship, to which the appellees are subjected, because the *supersedeas-bond* does not I presume make the obligors therein responsible for rents and profits; but this is but a poor indemnity for the loss, which the appellees would sustain in such a case as the one before us, if the appellant was permitted to get repeated appeals and *supersedeases* every six months for a period of five years. His failure to print the record prevents this Court from deciding the case, as it cannot be submitted to us for decision till the record is printed. The trifling costs of the motion to dismiss his appeal because the record was not printed, is utterly insufficient in such a case as this to make it the appellant's interest to have the record printed, if he can by failing to do so continue in the possession for five years of his property decreed to be sold, without giving any security for the rents and profits. It is true, that in this case the appellant in his third appeal asked for no *supersedeas*, but it is obvious, that if we can properly award him this third appeal we would be bound, if he asked it, to award him a third *supersedeas* also.

This right to an appeal and *supersedeas* is a legal right where it exists at all, and if this Court thinks there is error in the decree prejudicial to the appellant, such appeal and *supersedeas* must be awarded. If this right to a third appeal and *supersedeas* exists it must be granted, though this Court was satisfied, that the only reason why the record had not been printed was, that the appellant desired to prolong the time during which he would occupy the property ordered to be sold, without giving any security for the rents and profits. If a case has been dismissed for want of prosecution, through some accident or mistake or through the fraud of the appellees, this Court can reinstate it if such equitable circum-

stances can be proven by affidavits. See *Thornton v. Corbin*, 3 Call 321 and 332, and *Craigen et al. v. Thorn et al.*, 3 H. & M. 269. But the right to apply for a second or third appeal is, where it exists, a legal right and not an equitable one, and such equitable considerations as those we have referred to in connection with the dismissal of a former appeal cannot be considered by this Court in deciding, whether such second or third appeal can be granted when it must be granted or disallowed with reference to these outside facts, which cannot be in any way proven. I am therefore of opinion, that the appeal awarded in this case was improvidently awarded, and must therefore be dismissed; and the appellees must recover of the appellants their costs in this Court expended.

JUDGES JOHNSON AND SNYDER CONCURRED.

APPEAL DISMISSED.

WHEELING.

STATE OF WEST VIRGINIA v. WADE H. THOMPSON.

Submitted August 15, 1882—Decided December 16, 1882.

(*WOODS, JUDGE, Absent.)

1. A bill of exceptions in a criminal case, upon the refusal of the court to grant a new trial on the ground, that the verdict is contrary to the evidence, certifies all the evidence and all the evidence for the prisoner is in conflict with that of the State so, that it is impossible that both can be true, the appellate court will reject all the evidence of the prisoner and look only to that of the State. (p. 754.)
2. In reviewing the judgment of the court below in such cases, the appellate court will not reverse the judgment of the court below on the ground, that there is a doubt of its correctness; but it must be satisfied that the evidence is plainly insufficient to warrant the verdict. (p. 755.)
3. The courts of this State are peculiarly jealous of any encroachment by the court on the province of the jury, and it is error for a court in the trial of a case, to intimate any opinion in refer-

*Case submitted before Judge W. took his seat on the bench.

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40	721
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41	651
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43	57
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43	677
43	694
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47	126
21	741
51	301
21	741
53	267
21	741
56	313
21	741
59	33
21	741
62	709
63	408
21	741
64	637
21	741
66	202

ence to matters of fact, which might in any degree influence the verdict nor can the court instruct the jury as to the weight to be given by them to the evidence of any witness, whether the witness be impeached or not, or whether he is contradicted as to material facts or not. The jury are the exclusive judges of the weight to be attached to the evidence of any witness, and the court would err in influencing them in any way in determining this weight, either by instruction as to the proper manner of ascertaining such weight, or otherwise. (p. 758.)

4. A court ought not to grant an instruction irrelevant to the case, though as a proposition of law it may be in the abstract right. (p. 760.)

Writ of error to a judgment of the circuit court of the county of Wayne, rendered on the 11th day of July, 1881, upon an indictment for murder against Wade H. Thompson, allowed upon the petition of said Thompson.

Thomas H. Harvey, special judge, rendered the judgment complained of.

GREEN, JUDGE, furnishes the following statement of the case:

On March 4, 1878, the grand jury of Wayne county was formed and duly sworn, and on March 6, 1878, found an indictment against Wade H. Thompson, for the murder of Alonzo McCoy on December 18, 1877. He had not been previously arrested, but immediately appeared in person and moved the court to quash the indictment, and also pleaded not guilty, and issue was joined and the case continued.

Two years afterwards, on March 4, 1880, the prisoner Wade H. Thompson was set to the bar in the custody of the sheriff, and the court overruled the motion to quash the indictment and the case was continued. And at a regular term of the court, on June 30, 1881, Ira J. McGinnis, the judge of the court opened the same, and at 12 o'clock the court took a recess till 2 o'clock p. m. of that day. But the judge failed to return to the court-room again at the appointed time to hold and continue said court, and the members of the bar present and practicing in the court, proceeded to elect a judge by ballot, to hold and continue said court during the absence of the judge.

The election was held by the clerk of the court and he declared, that Thomas H. Harvey a practicing attorney of the court, was duly elected as provided for by the statute law. And thereupon he took the several oaths required by law as such judge, and entered upon the discharge of the duties of his office; all of which was entered in the record book of the court. The prisoner, Wade H. Thompson, was set in the bar in the custody of the sheriff of the county, and a jury was elected, tried and sworn to well and truly try and true deliverance make between the State and Wade H. Thompson the prisoner at the bar, whom they should have in charge and a true verdict render according to the evidence. A part of the evidence was heard and the case was regularly and properly continued from day to day, and having been completed and committed to the jury on July 8, 1881, they rendered their verdict as follows: "We the jury agree and find the defendant Wade H. Thompson, guilty of murder in the second degree, as charged in the within indictment, and ascertain and fix his period of confinement in the penitentiary for the period of five years."

The prisoner moved the court to set aside the verdict, as contrary to the law and evidence, for improper conduct on the part of the jurors, and because the jurors were disqualified. And on the 15th day of July, 1881, no evidence having been offered to sustain the two last named grounds for a new trial, the court overruled the motion for a new trial, and in accordance with the verdict rendered a judgment whereby it sentenced the prisoner to be confined in the penitentiary for five years. From this judgment this Court has awarded a writ of error.

Three bills of exceptions taken during the trial, were signed and sealed by the presiding judge and made a part of the record. The first bill of exception sets out all the evidence in the case, and was an exception to the refusal of the court to grant the prisoner a new trial. The second exception was to the court's permitting, against the objection of the prisoner, five different questions to be propounded to witnesses and their answers, to go as evidence to the jury. What is deemed necessary to state in reference to these questions and answers, will be stated in the opinion. The last exception

was to instructions given and refused by the court and was as follows:

INSTRUCTION No. 3.

“The court instructs the jury that if they are satisfied from the evidence that William Patterson, Esther Patterson, Harvey Patterson, Alfred Allen, Moses Hunt and Rebecca Hunt, witnesses for the State, or either or any of them, have or has willfully and knowingly swore falsely as to any fact or matter material to the issue involved in this case, that the jury are to disregard each and every other material fact sworn to on this trial by each and every of the said witnesses whom they are so satisfied have sworn falsely as aforesaid, except so far as they may be further satisfied from the evidence that the other material fact or facts so sworn to by each witness or witnesses has or have been corroborated by other creditable evidence in the case.”

INSTRUCTION No. 5.

“The court instructs the jury that if they are satisfied from the evidence that the deceased, Alonzo McCoy, had shot one Moses Hunt jr., shortly before his death, and that the said Hunt complained of such shooting to and in the presence of the several persons named by the witness, Rebecca Hunt, and William Fortner, at the house of John Thompson, and desired them to arrest said McCoy therefor, and that the said persons so complained to had come to believe and did believe that the said McCoy had been and was guilty of a felony in and by such shooting, and that in pursuance of such request and belief they went to the house of William Patterson for the sole purpose of arresting said McCoy without a warrant issued by any officer for that purpose, that the said persons, and each of them, had the right under the law to arrest the said McCoy for the said offense so charged against him, although they had no warrant or authority for making such arrest except the general authority which the law gave them.”

INSTRUCTION No. 6.

“The court instructs the jury that the evidence in this case is not sufficient in law to authorize them to presume or find that the prisoner, Wade Thompson, conspired with others to murder Alonzo McCoy.”

INSTRUCTION No. 8.

“The court instructs the jury that if they believe from the evidence that the witness, William Patterson, was a witness before the grand jury and testified against the prisoner and others in relation to the charge contained in this indictment, and that the evidence he gave before the grand jury as to said charge was and is materially different in any material matter connected therewith from the evidence he gave on this trial or to the same matters, and if they further believe from the evidence that the said Patterson gave evidence on the former trial of this case, or made statements out of court relating to the issues in this case, materially different to what he has sworn to on this trial, and that he was interrogated as to such evidence and statements on this trial and denied having made them, or to have so sworn differently, and if they further believe from the evidence that the said Patterson has, in his evidence on this trial, made false and contradictory statements as to any matter or matters material to the issue in this case, that then and in that event the jury are to take in consideration all such evidence, statements and contradictions in determining the degree of credit to be given to the evidence of said Patterson on this trial. And if they believe therefrom, or from any other evidence given by him or others on this trial, that he is unworthy of credit, they have the right to disregard his evidence in this trial.”

INSTRUCTION No 9.

“The court instructs the jury that if they believe from the evidence that the witnesses, Esther Patterson, Harvey Patterson, Alfred Allen and Rebecca Hunt, were sworn and examined as witnesses for the State on the former trial of this case, and that they, or any of them, testified on that trial, or to any matter or fact material to the issue in this case, differently from the evidence given by them, or either of them, in relation to the same matter or fact on this trial, and that they, or any of them, have made contradictory statements in their evidence in this case in relation to any matter or fact material to the issue in this cause on this trial, then and in that event the jury are to consider such contradictory statements and evidence in determining the degree of credit to be

given to any such witness. And if they believe from such evidence, and from any other evidence in this case, that any such witness is unworthy of belief, they may disregard his or her evidence."

INSTRUCTION No. 10.

"If in endeavoring to arrest a felon some one of a party should kill him, it will be neither murder nor manslaughter in others who were along and who did not participate in the killing."

INSTRUCTION No. 11.

"If one goes with others to arrest a man charged with felony, he is not responsible for any malicious or wrongful intent of the others."

INSTRUCTION No. 12.

"If the jury believe from the evidence that the prisoner went with others to arrest Alonzo McCoy, and whilst so arresting or attempting to arrest him, the deceased attempted to escape, and some one of the party other than this prisoner fired and killed him, they shall find the prisoner not guilty, unless they are satisfied from the evidence that the prisoner had also conspired with the others to do the deed."

INSTRUCTION No. 14.

"If the jury believe from the evidence that the prisoner was attempting to arrest a man charged with a felony in a lawful manner, and killed him without intending to do so or to hurt him, then they shall find him not guilty.

"Which the court refused to give, and in lieu of 3, 5 and 8 gave the following instructions—that is to say :"

INSTRUCTION No. 3.

"If the jury believe from the evidence that any witness who has testified in this case has knowingly and willfully testified falsely to any material fact in this case, they may disregard the whole testimony of such witness, or they may give such weight to the evidence of such witness on other points as they may think it entitled to. The jury are the exclusive judges of the weight of the testimony.

"To which ruling of the court in refusing said instructions and giving in lieu thereof the others, the prisoner excepted and tendered his bill of exceptions, and which he prays might

be signed, sealed and made a part of the record in this case, and the same is accordingly done."

The evidence set out in bill of exceptions No. 1 proved the following facts: That on the 17th day of December, 1877, Wade H. Thompson had a barn-raising at his house, and there were some twenty persons there the greater part of the day and they were drinking, but to no great excess. Among those who were there on that day, were John Thompson, Mart Thompson, Bill Fortner, John Wilson and Moses Hunt. John Thompson left and went to his own house, probably a half mile off, and came back to the top of the hill and hollowed, that McCoy had shot Moses Hunt's son, and he wanted them to come up and help take him. He said too, that McCoy would take or had taken his horse that night, and he would follow McCoy to hell or have him. Wade H. Thompson and a number of persons went over to John Thompson's house.

There is a considerable diversity in the statement of the witness, as to whom of those who were at Wade H. Thompson's, went over to his brother, John Thompson's; but they all agree, that Wade H. Thompson went with them. When they reached there it was found, that young Hunt was there and wounded to some extent in the thigh, probably not severely, but to what extent does not appear. The only evidence given as to how he was shot, was given by the brother-in-law of Alonzo McCoy, and he says, that on that day McCoy shot at the horse on which young Hunt was riding; why he did so he does not know as they had had no quarrel. On the second shot, young Hunt was struck in the thigh by the ball accidentally. McCoy and his brother-in-law were together. McCoy lived a short distance across the Kentucky line, but was then at his brother-in-law's in West Virginia, a few miles from Thompson's.

Some witnesses state, that John Thompson proposed that the party should at once start and find McCoy and arrest him; and some of the party objected as there was no warrant for his arrest. But the mother of young Hunt, who had been shot, and was there says, John Thompson whispered to her that he intended to shoot his damn brains out. While another of the party said, they were going to arrest

McCoy, and he did not want him to shoot his eye out. The whole party before starting, armed themselves with rifles, guns and pistols. They went to William Patterson's, a brother-in-law of Alonzo McCoy, and according to the statement of Esther Patterson, the wife of William Patterson, and their son Harvey Patterson, the party came into the house of Patterson, some by the front door and others by breaking in the back door. William Patterson and Alonzo McCoy, the brother of Mrs. Patterson, were not in, and they did not tell Mrs. Patterson what they wanted; only enquired where William Patterson her husband, and her brother Alonzo McCoy was. She told them, that she did not know. They were at that time, down at Powder Mill creek, a short distance from the house on a flat-boat, where there was music and dancing. After awhile they returned, and as they approached the house were heard talking; when the whole party went out of the house and according to the testimony of William Patterson, Esther Patterson and Harvey Patterson, all of whom witnessed the scene, they all without saying a word, opened fire on McCoy without any attempt at his arrest, whereupon he fled; they pursued him, continuing to fire upon him and in running got up within probably twenty yards of him, when he hollowed, that he was shot. William Patterson and his wife, then went to where he was and found that he was badly shot and removed him to their house, and sent for a doctor. McCoy died the next day in Wayne county, West Virginia, of the wounds he had received.

The only defense offered by the prisoner was an attempt to prove, that he was not one of the party, who went to William Patterson's that night, but that he refused to go with the party, and returned from his brother John Thompson's to his own home before the party started after McCoy. The evidence would seem to establish beyond dispute or controversy, that all of the party who went in pursuit of McCoy, were guilty of his murder. The evidence on the part of the commonwealth tends to prove, that Wade H. Thompson was one of the party, and engaged in pursuing and firing on McCoy. The witnesses were Esther Patterson and Harvey Patterson, and they had a good opportunity of knowing whether he was one of the party or not. They knew him

quite well, and he was for sometime, how long does not appear, in the house and according to their statement there was a good light in the room made of pine. Their statement as to Wade H. Thompson being one of the party, and actually firing on McCoy as he ran, is corroborated by William Patterson, who was with McCoy and when they opened fire he stepped to the right and McCoy ran to the left, and they all pursued him till passing near Patterson's, McCoy was shot down. It was a bright moonlight night, and he was probably within twenty or thirty yards of them, and knew Wade H. Thompson quite well. The statement of these witnesses, that Wade H. Thompson was one of the party is corroborated also by Moses Hunt sr., the father of the young man whom McCoy shot. He states, that the day after McCoy was shot, he asked Wade H. Thompson "How far did you boys shoot at Lon. McCoy last night? He replied, "By God about as far as from here to that stump. By God he just fell as dead as a beef shot down." The stump he referred to was six or seven yards off. And also by his wife Rebecca Hunt, who was at the house of John Patterson with her son, who was then wounded, when the party left there to go to William Patterson's house in search of McCoy. He Wade H. Thompson, came back with others to John Thompson's house. She asked him on his return, what was done and he said, "We have killed him as dead as hell, and you fellows have got to swear us out of it." She is the witness who testified, that John Thompson said before they left, that "he intended to shoot his damn brains out."

In opposition to this however, the prisoner proved by six witnesses beside himself, that he was not with the party who went to William Patterson's house that night; but that after going up to the house of his brother, John Thompson's, he returned to his own house and staid there all night. Some of them say, that he and others refused to go with the party who went to William Patterson's house, because they had no warrant to arrest McCoy. And that Wade H. Thompson, before they left John Thompson's to arrest McCoy, left there with some others and went home.

Thus the statements of the witnesses for the commonwealth and the witnesses for the prisoner, were in irrecon-

cilable conflict; and one or the other must be regarded as intentionally false. In such case, whether the prisoner was or was not guilty, depended solely on whether the witnesses for the commonwealth or the witnesses for the prisoner told the truth. The verdict of the jury was entirely dependent on the credit they attached to the testimony of the different witnesses.

The petition for the writ of error, refers at length to different portions of the testimony, which it insists destroys the credibility of the witnesses for the State. The three witnesses present at the murder all state, that the party engaged in it were six in number, all of whom they distinctly recognized except one dressed in blue, whom they took to be the father of young Hunt, who was shot. There does not appear to be any reason why they could not recognize him, as readily as any of the others; and if what they say is true it is certainly remarkable, that they all thus failed to recognize him clearly. Esther Patterson says, she thought when she opened the front door, she recognized the three who came in that way, though she does not say she certainly knew who they were; but this does not appear to be inconsistent with her statement, that she knew well who the party were except one of them, as she had a good opportunity of afterwards recognizing them, when they were in the room with her in which there was a good light. She speaks confidently of the prisoner being one of the party. But there was some diversity in the statements of these three witnesses as to how Wade H. Thompson was equipped and armed. Young Patterson, a boy then about thirteen years old, said at first, that he had a gun, and afterwards said he had no gun, but had a pistol and a pair of saddle bags on his shoulder. His father says, that he had a gun and pistol, and after firing his gun took his pistol out of his saddle-bags. These three witnesses, the father, mother and son, say, that the entire party ran after McCoy when he fled, firing upon him repeatedly; while the evidence shows, that one of the persons whom they recognized as one of the party, had a stiff knee and could not run much faster than a quick walk.

There were also some other slight variations in the statements of these witnesses. Two of the grand jurors testified,

that Wm. Patterson, before them swore to these six men being of the party, and also some others not named. But another grand juror thought, that he spoke of these six men as of the party, but does not say he spoke of any others as of the party. Wm Patterson admits, that one of this party who owed him nothing, handed him an envelope which contained seventy dollars, and that he Patterson used the money. He also says, that the prisoner offered him five hundred dollars not to testify. This the prisoner denied. The parents of young Hunt corroborate the State's three witnesses in their statement, that the prisoner was one of the party who murdered McCoy. The father's testimony is weakened by the fact, that the commonwealth's three witnesses all thought that he was one of the party who murdered McCoy, though they did not identify him certainly, and he was indicted and the indictment was dismissed. He denied that he was present. His testimony is further weakened by its being testified, that he told a witness he did not believe that the prisoner knew anything about the murder. His character too, as well as that of his wife for veracity, was assailed; four witnesses who lived near him when in Kentucky, saying, that they were not worthy of belief on oath. But as to whether these four witnesses can be relied on as competent witnesses to testify on such a subject, is questionable. One was the prisoner's nephew, and another was a brother-in-law of this nephew, and a third left Kentucky under a charge of sheep stealing. Certainly if the character of the Hunts for veracity, was bad in the neighborhood in Kentucky where they lived, the prisoner could have got less exceptionable witnesses to testify to their bad character for veracity.

While therefore the testimony of the State was given by witnesses, who to a greater or less extent may be regarded as unreliable, yet on the other hand the testimony of the witness for the prisoner, whereby he proved an alibi, is also certainly suspicious and may well not have been believed by the jury. There were no less than seven of them, but their testimony differed in material matters of fact about which, if they were all telling the truth, it would be very strange that they should so differ. All of them agree, that the prisoner when called by his brother John Thompson, went with others over to his

house, and in a time varying from a half hour to two or three hours, returned to his home and staid there all night; which if true of course proves, that he was not of the party who went to Wm. Patterson's from John Thompson's and murdered McCoy that night. But this is about all in which they do agree. Thus one of them says, he came back alone from his brother John Thompson's. He states the names of others who went over with him, but he says none of them came back to Wade H. Thompson's excepting Wade H. Thompson himself. Six others say, that Wade H. Thompson came back with one, some two and others three, giving the names of them; then, two of them thus named, were testified to by the State's witnesses as being at that time at Wm. Patterson's, engaged in the pursuit of McCoy. Some of them were persons who went over with Wade Thompson to his brother's; and it is strange if speaking the truth, that they do not agree as to who came back, and who among them staid all night at Wade H. Thompson's. Several of these witnesses occupied relations to the prisoner and to the case, that tended to weaken their testimony. One was the prisoner himself, another was his brother, John Thompson, who admits that he went to Wm. Patterson's after McCoy, but makes no statement of what occurred there; nor does he state who went with him. Another was the step-mother of the prisoner, a fourth was one of the party whom the State's witnesses testified was present and aiding in the murder of McCoy; and a fifth one was testified to be unworthy of belief on oath, by another of the defendant's witnesses.

The jury by their verdict, appear to have placed more faith in the witnesses for the commonwealth, than in these witnesses for the prisoner. There was other evidence in the case of a not very important character, which I deem it unnecessary to state. What has been stated shows the general character of the case, and is amply sufficient to enable us to determine the relevancy or irrelevancy of certain of the instructions asked by the prisoner and refused by the court, as well as to determine the propriety of the court's refusal to grant a new trial to the prisoner.

A more detailed statement of the case is unnecessary to enable us to understand the opinion of the Court, and this has

been the object of stating it, to the extent to which it has been stated.

James H. Ferguson for plaintiff in error cited the following authorities: 17 Gratt. 473, 483, 484; 18 Gratt. 801, 815, 816; *Ward et al. v. Chum*.

Attorney-General Watts for the State cited the following authorities: 1 Greenl. Ev. § 49; *Id.* § 111; 23 Gratt. 409; 1 Bish. Cr. Pr. § 979; Whart. Cr. Ev. § 384; Whart. Cr. Pl. & Pr. §§ 710, 714; Archt. Cr. Pr. & Pl.; *Id.* 641, 644; Bish. Cr. Pr. §§ 978, 981; Whart. Cr. Pl. & Pr. § 13; 1 Whart. Cr. Law, § 410; *Id.* 402; 2 Whart. Cr. Law, §§ 1398, 1404.

GREEN, JUDGE, announced the opinion of the Court:

The petition for a writ of error in this case, was founded as I conceive upon serious misconception of the true relations in this State, which exist between a court and a jury in the trial of any case, either civil or criminal. And also upon a misconception of the grounds on which the Appellate Court in a criminal case, will reverse the judgment of the court below, when a new trial was asked and refused by the court below. The petition is obviously based on the assumption, that it was the duty of the court below to have awarded a new trial, simply because in its judgment there was a reasonable doubt as to the guilt of the prisoner, and that if this Court can be satisfied that such reasonable doubt exists, that it is the duty of this Court to reverse the judgment of the circuit court and award a new trial.

If such a principle was acted upon by this Court, it would be it seems to me obviously an unjustifiable interference on the part of the Court with the province of the jury, and a dangerous violation of what is the well settled practice of the courts of this State and of Virginia.

In *Grayson's Case*, 6 Gratt. 712, it was decided, that new trials are grantable at the instance of the accused in all criminal cases, and that motions for new trials are governed by the same rules in criminal and in civil cases. And it was also held in this case, that when the evidence is contradic-

tory and the verdict is against the weight of the evidence, a new trial may be granted by the court which presides at the trial; but its decision is not the subject of a writ of error or *supersedeas*, nor examinable by an appellate court. It seems obvious from the statement we have made in this case, that if this be law no new trial can be properly granted by this Court in this case on its merits, if no errors were committed by the court below in the trial. And yet, the elaborate petition for a writ of error in this case, occupying more than twenty-five manuscript pages, is based principally on the allegation, that the evidence is contradictory and the verdict against the weight of the evidence.

The evidence in this petition is summarized, with a view of establishing these propositions, and if *Grayson's Case*, 6 Gratt. 712, be law, the petition on its face shows, that on this the principal ground relied on, the decision of the circuit court is not subject to be reviewed by this Court; but is final. In full accord with this decision in this respect, is the case of *Vaiden v. The Commonwealth*, 12 Gratt. 717, in which the court of appeals decided that, "A bill of exceptions in a criminal case upon the refusal of the court to grant a new trial, on the ground that the verdict is contrary to the evidence, is to be framed in the same way as the bill of exceptions in civil cases to the like refusal is framed. And if the evidence is certified instead of the facts proved, the appellate court will only look at the evidence introduced by the commonwealth."

Now after reviewing the evidence of the commonwealth the petition for a writ of error in this case says, "If the evidence of these witnesses was true, and the killing of McCoy took place as sworn to by them, it was a clear and unmitigated case of willful, malicious, deliberate and premeditated murder as to all concerned in it. It was committed according to this evidence without cause, without provocation, without necessity, without any attempt to arrest McCoy for shooting young Moses Hunt, and in a most reckless, savage and unheard of manner." And as the commonwealth's witnesses prove, that the prisoner aided directly and personally in this savage murder, it must according to the case of *Vaiden v. The Commonwealth*, 12 Gratt. 717, follow, that had the jury

found a verdict against the prisoner of murder in the first degree, and it had been approved by the circuit court, this Court would not have awarded a new trial, though as in the petition it is insisted that, the defendant's evidence satisfied this Court that the commonwealth's evidence was false and utterly misrepresented the case; for this Court "will only look in such a case, at the evidence introduced by the commonwealth." We cannot in coming to a conclusion, even look at this evidence of the defendant.

In accord with their decisions, this Court held in *Seibright v. The State*, 2 W. Va. p. 591, that, "Even if the verdict of the jury, in the opinion of the Appellate Court, has been against the weight of evidence, and the court below has refused a new trial, it would be improper for the Appellate Court to interfere with its decision." These decisions are obviously based on the universally recognized principle in this State, that the jury are the judges of the facts and if upon the facts they have found the defendant guilty, and this finding is approved by the court which presided at the trial, the Appellate Court which labors under the great disadvantage of not hearing and seeing the witnesses testify will never, on a certificate of the evidence, disturb such verdict and judgment, merely because the evidence of the prisoner contradicted that of the commonwealth, if that of the commonwealth justified the verdict. For this Court must presume, that the jury before whom the case was tried, and, the judge who presided at the trial and heard the evidence, properly regarded the evidence of the commonwealth as more trustworthy than that of the prisoner. We cannot set up our judgment as to the credibility of witnesses, against the judgment of the jury and the court below, for their opportunity of reaching a just conclusion as to the reliability of witnesses is far superior to ours. In such a case, the judgment of the court below can only be reversed, for errors of law committed by the court below, in the progress of the case.

It only remains then to enquire whether any such errors were committed. And first, did the court below commit any errors in refusing the prisoner's instructions or any of them, or in granting the instructions it did in lieu of instructions number three, five and eight as the record says, but

which was intended in lieu of numbers three, eight and nine? The third instruction asked by the prisoner, was in effect, that if the jury believed that certain of the commonwealth's witnesses had willfully sworn falsely about any material fact, they were to disregard his evidence altogether as to every other material fact, unless he was in his statement about such other material fact corroborated by other credible evidence in the case. In determining whether this instruction should have been granted, it is necessary for us to have a clear conception of the respective duties and obligations of the court and jury, in the trial of such a case.

In England, as well as in some of the States of this Union, much more latitude is given the judge in such a case, than is given them in Virginia or in this State. In some of the States the rule seems to be, that a judge has a right to express his opinion to the jury on the weight of evidence, and to comment thereon as much as he deems necessary for the course of justice; and an erroneous opinion on matters of fact is no ground for a new trial, unless he goes to the extent of inducing the jury to believe, that he has withdrawn this matter from their consideration. See *Commonwealth v. Child*, 10 Pick. 252 and *People v. Rathbun*, 21 Wend. 509; *Johnston v. Commonwealth*, 85 Pa. St. 54. In this last case it was held, that these words, "I cannot for my part see how the jury can hesitate a moment to convict the prisoner on the third count," were not on the facts, too strong an instruction. A far different rule has always prevailed in Virginia and in West Virginia. Our authorities are reviewed in the case of *State v. Hurst*, 11 W. Va. p. 75. It is there said, "In Virginia the courts have always guarded with jealous care the province of the jury." Thus as far back as *Ross v. Gill, and wife*, 1 Wash. 88, President Pendleton said, "If the question depends upon the weight of testimony, the jury, and not the court, are exclusively and uncontrollably the judge * * * and Judge Moncure in *McDowell Ex'rs v. Crawford*, 11 Gratt. 405, as a result of the conclusion of a review of the cases this language is used: 'They evince a jealous care to watch over and protect the legitimate powers of the jury. They show, that the court must be very careful not to overstep the line which separates law from fact. They estab-

lish the doctrine, that when the evidence is *parol*, any opinion as to the *weight*, *effect* or *sufficiency* of the evidence submitted to the jury, any assumption of a fact as *found*, or even an intimation that written evidence states matters, which it does not state, will be an invasion of the province of the jury.

* * * If the province of a jury should be thus guarded with jealous care in a civil case, much more and for stronger reasons, should it be watched, guarded and protected in a criminal case."

In that case, upon it being reported to the court by one of the jurors the others being present in court, that he thought the jury could not agree, the judge said to him in the presence of the jury, "I see no reason why the jury cannot agree upon a verdict in this cause," and directed the jury to return. The jury found the prisoner guilty, and this Court deemed this a sufficient reason to set aside the judgment and verdict and award a new trial. This case shows the marked difference between this Court and the court of appeals in Virginia on the one hand, and some of the appellate courts of some of the other States in regard to the care, which is exercised to guard the province of the jury from being interfered with by the court.

In the case of the *State v. Betsall*, 11 W. Va. p. 704, it was decided by this Court, that "a conviction may be had on the uncorroborated testimony of an accomplice, and in such case, if the judge who presided at the trial is satisfied with the verdict and refuses to set it aside, the Appellate Court will not reverse the judgment and set aside the verdict on the ground, that it rested solely on the uncorroborated testimony of an accomplice." This conclusion is based on the fact, that the jury are the sole judges of the credibility of all admissible testimony; and in this State the court would err in advising the jury not to convict on the uncorroborated evidence of an accomplice, though this is the common practice in England and in some of the States. But it is utterly opposed to the practice in this State or in Virginia. On page 740-741, 11 W. Va. R., this Court says, "Our courts are somewhat peculiar in this respect; but the law has been so held in Virginia from the earliest history of her jurisprudence; and we think it constitutes one of the brightest ornaments thereof."

And on page 743 this Court says, "When the jury has found the defendant guilty in a criminal case, and a motion to set aside a verdict and grant a new trial on the ground, that the evidence is insufficient to sustain the verdict, the appellate court will not set aside the verdict and grant a new trial, unless it is irresistibly clear that the conviction was wrong."

Upon these authorities it seems to be clear, that the circuit court would have erred in instructing the jury that they were to disregard any material fact sworn to by any competent witness, whether corroborated or not, because the jury believed that the witness had sworn falsely to any other material fact. It was the exclusive province of the jury to weigh the evidence of every witness, and to give to it whatever weight they deemed it entitled; and the court properly in this case, declined by this and other instructions asked, to interfere by the expression of any opinion or views on the weight of the evidence, or as to the manner in which it was to be weighed.

The third instruction asked by the prisoner was properly refused. The instruction given by the court in lieu of instructions three, five and eight meaning the third, eighth and ninth was, "that the jury might disregard entirely the testimony of a witness, who had knowingly and willfully testified falsely as to any material fact; or they might give such weight to his evidence on other points as they might think it entitled to, and that the jury were the exclusive judges of the testimony. This instruction is unobjectionable, and it was very properly substituted for the prisoner's instructions number three, eight and nine, which were well calculated to mislead the jury; and were encroachments on their province. Ought instruction number five for which, it was by mistake said to be substituted, to have been given? This instruction it seems to me ought not to have been given. I apprehend, that it does not even as an abstract question of law propound the law correctly, but be this as it may, it undertakes to instruct the jury under what circumstances private persons have a right to arrest suspected felons. Now there was not a particle of evidence in this case to prove, that McCoy was shot by the prisoner and others while they were attempting to arrest him, or that they made any sort of an attempt to

arrest him; and therefore any instruction with reference to the right of the prisoner or others to arrest him, was irrelevant and calculated to mislead the jury and was properly refused on this account.

The sixth instruction was also properly rejected for the reason, that it was irrelevant to the case and calculated to mislead the jury, as well as unsound law. The prisoner was not charged, nor did the State seek to hold him responsible in any manner, for the murder of McCoy, because he had previously conspired with others to murder him. Both the charge and the proof on the part of the State was, that the prisoner personally murdered McCoy, and it was theretor immaterial and foreign to the case for the jury to determine, whether the prisoner had or had not previously conspired with others to murder him; and the court properly declined to say, whether the evidence was or was not sufficient in law to authorize them to presume or find, that the prisoner had entered into such a conspiracy. Had the instruction asked been relevant, it ought on its merits to have been refused.

From the views we have expressed it follows, that all that was proper in instructions number eight and number nine was given in a much clearer manner by the court in the instruction it did give. Instructions numbers ten, eleven, twelve and fourteen asked by the prisoner, are all properly refused by the court. For it is obvious from the statement of the case we have made, that they were entirely irrelevant to the case, there being in the case no evidence tending in any degree to establish any of the supposed cases on which their several instructions were based. They were mere abstract questions of law, and whether they correctly propounded the abstract law or not, as they were entirely irrelevant to the case, they were properly rejected. The granting of any of them, if it did not mislead the jury, could only have distracted their attention from the real case before them, and the court therefore properly rejected each of them.

The truth is as the statement of the case shows, that there were really no questions of law involved in the trial, but simply questions of fact, not even conclusions of facts to be drawn from other facts, but only whether the facts clearly proven by the witnesses of the State were really facts, or mere

false statements. This depended on the credibility of the witnesses of the State. For it what they said was true, what was testified to by the witnesses for the prisoner was necessarily false. It was a pure question of fact depending entirely on the credibility of witnesses, and of course this Court in such a case could not reverse the verdict of a jury approved by the court below. There was not a particle of evidence tending to show, that McCoy was shot by persons who were attempting to arrest him for a supposed felony. And all the instructions which are based on such supposed cases, were entirely irrelevant and properly refused.

It only now remains to determine, whether the court below erred in permitting testimony to go before the jury against the prisoner's protest, which was illegal testimony. While an exception of this sort was taken, it was not assigned as an error in the petition for a writ of error by the prisoner, nor has it in argument been insisted on before this Court. The dying declarations of McCoy were properly admitted as it was proven, that when made he expected quickly to die. One question was objected to as leading, but it seems to me it was not liable to the objection and it was properly permitted to be answered. The objection to the proof going to the jury, that John Thompson hollowed to his brother and friends from the hill between their houses, to get their horses and come over, that McCoy had taken his horse and he would take him or ride through hell, as well as the statement made by Mrs Hunt, that one of the party going over to Patterson's in search of McCoy called at his house and got a gun and loaded it, while others were hunting him up, was properly overruled by the court, they being evidently parts of the *res gestae* proper to go to the jury. I conclude therefore, that there was no error in the judgement of the circuit court of July 1, 1881, and that it must be approved and the State recover of the defendant in error its costs in this Court expended and thirty dollars damages.

THE OTHER JUDGES CONCURRED.

JUDGMENT AFFIRMED.

WHEELING.

STATE OF WEST VIRGINIA v. YATES.

Submitted June 16, 1882—Decided March 17, 1883.

(*WOODS, JUDGE, Absent.)

21	761
38	64
21	761
54	590
21	761
56	313
21	761
58	43

21	761
64	297

1. Where, in an indictment under section 9 of chapter 144 of the Code, the word *feloniously* is used in characterizing the assault in the first part of the indictment and is joined by the copulative and the words, *then and there*, to the subsequent clause which charges the shooting or giving the wound, it is sufficient; and it is not essential that the word *feloniously* shall be again repeated before the allegation of the shooting or wounding in order to make it a good indictment for a felony. (p. 763.)
2. Before this Court will reverse a judgment for the admission of evidence claimed to be improper, on an exception to such evidence, the exceptor must satisfy it affirmatively that an error to his prejudice has been committed by such admission. (p. 764.)
3. The decisions of this Court in the cases of *State v. Cain* and *Same v. Jones*, 20 W. Va. R., reaffirmed. (p. 766.)

Writ of error to a judgment of the circuit court of the county of Taylor rendered on the 18th day of February, 1880, upon an indictment against Jedediah W. Yates for feloniously shooting with intent to kill, allowed upon the petition of said Yates.

Hon. A. B. Fleming, judge of the second judicial circuit, rendered the judgment complained of.

The facts of the case are stated in the opinion of the Court.

M. H. Dent, for plaintiff in error cited the following authorities: 14 Gratt. 696; 13 W. Va. 859.

Attorney-General Watts for the State cited the following authorities: Code p. 678 § 9; 2 Arch. Cr. Pr. & Pl. 74; 23 Gratt. 972; 8 Car. & P. 632; 1 Bish. Cr. Pr. §§ 445, 446; Code p. 720 § 18; 12 Cush. 612; 2 Allen 163; 109 Mass. 349; 2 Harr. & J. 426; 5 Porter 52; 2 McCord 287; Rice 431; 1 McMull. 189; 26 Mo. 515; 2 Bish. Cr. Pr. § 652; 30

*Case submitted before Judge W. took his seat upon the bench.

Conn. 500; 1 Russ. Crimes 746; Code p. 700 § 9; *Id.* p. 678 § 2; *Id.* p. 699 § 1; 97 Mass. 406; 107 Mass. 325; Steph. Dig. Ev. 42, note; 24 How. 224; 1 Greenl. Ev. § 49 and note; Litt. Sel. Cas. 500; 3 Greenl. Ev. (13th ed.) § 15 and note; 9 W. Va. 616; 8 W. Va. 743, 759; 17 Gratt. 566; 19 Ark. 405; 1 Clarke (Ia.) 542; 2 Bish. Crim. Pro. § 660 and note; 2 Arch. Cr. Pr. & Pl. 5; *Id.* 74; 1 Russ. Crimes 719; 7 Blackf. 233.

SNYDER, JUDGE, announced the opinion of the Court:

On the 23d of September, 1879, Jedediah W. Yates was indicted for a felony by the grand jury of Taylor county. The indictment contains two counts founded on the provisions of section 9 of chapter 144 of the Code. The first charges that the said "Jedediah W. Yates, on the — day of —, 1879, in the said county, with a certain gun, then and there loaded with gunpowder and leaden shot, feloniously and of his malice aforethought, did shoot one Hezekiah Bailey, with intent him, the said Hezekiah Bailey, then and there to maim, disfigure, disable and kill, against" &c. The second count is, "that Jedediah W. Yates, on the — day of —, 1879, in the county aforesaid, *feloniously*, with malice aforethought, in and upon one Hezekiah Bailey did make an assault, he, said Jedediah W. Yates, being then and there armed with a dangerous weapon called a gun, which said gun was then and there loaded with gunpowder and leaden bullets and shot, *and did then and there* shoot him, the said Hezekiah Bailey, with intent him, the said Hezekiah Bailey, with set purpose and malice aforethought, to kill and murder, against the peace and dignity of the State."

The defendant appeared, moved to quash said indictment and each count thereof and pleaded not guilty, which motion the court overruled, stating that, "it appearing to the court that the first count charges a felony, and the second count charges a misdemeanor." During the trial the defendant took three several bills of exceptions which will be hereafter considered in their order. The jury found their verdict in the words following: "We, the jury, find the prisoner not guilty of the felony charged in the within indictment, but

find him guilty of an assault and battery, and assess his fine at one hundred and twenty-five dollars." The court after overruling the motion of the defendant for a new trial, on the 18th day of February, 1880, gave judgment on said verdict against the defendant.

It is claimed by the defendant in error in this Court that the circuit court erred in not quashing the second count of the indictment, it being faulty as a count for felony, and, also, in refusing to quash the indictment, because according to the holding of said circuit court, it improperly joins a count for felony with a count for misdemeanor.

We are of opinion that both counts in said indictment are good, and that each sufficiently charges a felony. There is, therefore, no joinder of a count for felony with a count for misdemeanor and we need not in this case consider the effect of such joinder. The fact that the circuit court stated that the second count charged a misdemeanor, even if the said statement be held to mean that said count did not charge a felony, could not have prejudiced the defendant, because under section 18 of chapter 160 of the Code, upon an indictment for felony there may be an acquittal of the felony and a conviction for a misdemeanor if the latter be substantially charged in the indictment. In this case there can be no question that an assault and battery is sufficiently charged in both counts of the indictment.

It is alleged that said second count is fatally defective, because it does not repeat the word *feloniously* where the shooting is charged. The general rule is, that in statutory crimes, an indictment is sufficient which charges the offense in the language of the statute. The word *felony* is not used in the statute under which this indictment was found, and therefore according to this rule the word *feloniously* is not essential. But as the court of appeals of Virginia has held that this word is necessary, and the practice in this State has uniformly followed that decision it would not be judicious now to question it. Where the word *feloniously* is used in characterizing the assault in the first part of the indictment and is joined by the copulative, and the words *then and there*, to the subsequent sentence which charges the shooting or giving the wound, it is sufficient without adding the word

feloniously again to the allegation of the shooting; for that word runs through and characterizes the subsequent allegation coupled as it is by the copulative *and* and the words *then* and *there*. The repetition of the word *feloniously* in the subsequent clause, so connected, would be mere tautology and useless verbiage—2 Bish. Cr. Pro. § 547 and note 4; *Heydon's Case*, 4 Co. 41 a; 1 East P. C. 346; 2 Hawk. P. C. 314; *Maile's Case*, 9 Leigh p. 664.

In the second count of the indictment at bar the word *feloniously* is used in the first part of the count and is coupled with the allegation of the shooting in the subsequent part by the words *and* and *then and there*. These words unite all the clauses together and refer the descriptive word *feloniously* to all the subsequent verbs. The court, therefore, did not err in refusing to quash the indictment, either because the second count defectively charges a felony, or because there is united therein a count for a felony and also one for a misdemeanor.

The next error complained of arises out of the defendant's first bill of exceptions, from which it appears, that the "State introduced evidence to show an assault or attack made by the defendant, with a gun presented, on Hezekiah Bailey, some two years prior to the offense charged in the indictment, for the purpose of showing malice on the part of the accused." This bill of exceptions contains no statement of the evidence which preceded or followed that stated in this bill, and without such statement or the making of said bill a part of some other exception taken in the case, which has not been done here, this Court cannot advisedly say, that the circuit court erred in admitting the evidence complained of to go to the jury. All intendments and inferences are in favor of the ruling of the court below, and before this Court can reverse for the admission of evidence claimed to be improper the exceptor must satisfy the court affirmatively that an error has been committed to his prejudice. Such error does not satisfactorily appear from this bill of exceptions. However, if it were otherwise, we cannot say that the evidence was not proper. For, although where a relevant fact has greater or less weight in proportion to its proximity or remoteness in point of time, place and circumstances, it is

sometimes held that the court may, in its discretion fix the limit beyond which it becomes of inappreciable weight and reject it as immaterial though relevant, it is a practice liable to abuse, and therefore, unless the court can clearly see that it is too remote to be material, the safer and more satisfactory rule is for the court to admit whatever is relevant and leave the question of its weight to the jury—Step. Dig. Ev. 42 note (May's Ed.); *Shrewsbury v. Haycard*, 1 Doug. 375; 3 Gr. on Ev. § 15.

The evidence here admitted was relevant to show malice on a previous occasion and as nothing appears to satisfy the court, so far as the exception discloses, that such malice did not continue and exist at the time of the commission of the offense charged in the indictment, we think the court did not err in overruling the defendant's objection to its admission.

It is, also, insisted that the circuit court erred in refusing to give to the jury all, or any, of the instructions requested by the defendant and set forth in his second bill of exceptions. These instructions are as follows:

"1st. If the jury believe from the evidence that the witness, Bailey, was about to make a felonious assault on the defendant with intent to kill him, or to do him grievous bodily harm, and thereupon the defendant shot said Bailey for the purpose of preventing said assault, then the jury must find the defendant not guilty.

"2d. If the jury believe from the evidence that the defendant had reasonable cause to believe that the witness, Bailey, was about to make a felonious assault upon him with an oak stave, with intent to kill him, or do him grievous bodily hurt, at the time he shot said witness, and that said shooting was done to prevent said assault, then the jury must find the defendant not guilty.

"3d. The jury are not warranted in finding a verdict of guilty of any offense in this case unless they are free from all reasonable doubt as to whether the defendant, being a person of ordinary caution and prudence, had reason to believe, and did believe, at the time the shot was fired, that the witness, Bailey, was about to make a felonious assault on him.

"4th. If the evidence and circumstances in this case are sufficient to raise a reasonable doubt in the minds of the jury as to whether the defendant believed the witness, Bailey, was about to make a felonious assault upon him at the time he fired the shot, then they cannot find the defendant guilty, but must acquit him."

The questions involved in these instructions have been fully considered by this Court in the cases of *The State v. Cain*, 20 W. Va. 679; and *The State v. Jones*, *Id.* 764. The two first of said instructions are not law for the reasons assigned in the said case of *The State v. Cain*, and the two last are clearly in conflict with and contrary to the law of this State as laid down in said case of *The State v. Jones*. We do not deem it necessary to repeat here what was decided in those cases, which decisions we are entirely satisfied with and reaffirm. For the reasons assigned in said cases we do not think the court erred in rejecting each and all of said instructions.

The defendant's third and last bill of exceptions contains all the facts proved on the trial and the overruling of the motion of defendant for a new trial upon the ground that the verdict of the jury was contrary to the law and the evidence. The overruling of said motion to set aside the verdict is here assigned and insisted on as error.

Having considered all the legal objections raised in the case and found no error therein, we must now hold that the verdict was not contrary to the law. We are, also, of opinion that the verdict is not contrary to the evidence or the facts proved on the trial. "Where a case has been fairly submitted to a jury, and a verdict fairly rendered, it ought not to be interfered with by the court, unless manifest wrong and injustice has been done, or unless the verdict is plainly not warranted by the evidence or facts proved." *Miller v. Insurance Co.*, 12 W. Va. 116; *Grayson's Case*, 6 Gratt. 712; *Thompson's Case*, *supra*.

We have carefully examined the facts proved on the trial of this case as certified in said third bill of exceptions, and from said facts we are not only of opinion that the verdict is not plainly against the evidence, but that no injury or injustice has been done the defendant and that the verdict is well

warranted by the facts as certified. Upon a full consideration of the whole case we are of opinion, that there is no error in the judgment of the circuit court to the prejudice of the defendant, and, consequently, said judgment is affirmed with costs to the State, the defendant in error, and thirty dollars damages.

JUDGES JOHNSON AND GREEN CONCURRED.

JUDGMENT AFFIRMED.

WHEELING.

STATE OF WEST VIRGINIA v. FOSTER.

Submitted January 29, 1883—Decided April 14, 1883.

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1. An indictment under the seventh section of chapter 149 of the Code for "lewd and lascivious association and cohabitation," against one of the parties which only alleges that the defendant, on a certain day, and from that day to a certain other day, in the county, &c., did lewdly and lasciviously associate and cohabit with another person named in said indictment, said defendant and such other person not being married to each other during all that time, is fatally defective, because it fails to allege that the said parties so associated and cohabited "together," or "with each other." (p. 771.)
2. Before a party can be convicted of "lewd and lascivious cohabitation," it must appear on the face of the indictment, that *both* of the parties participating in the offense, lewdly and lasciviously associated and cohabited "together" or "with each other." (p. 776.)
3. The parties who thus lewdly and lasciviously associate and cohabit together, may be indicted *jointly* or *separately*. (p. 775.)
4. Where the court which tried the cause, certified all the *facts proved*, on the trial, and from the facts so certified, it clearly appears that they were wholly insufficient to sustain the verdict of the jury, the court will not hesitate to set the same aside, and in a proper case, award the defendant a new trial. (p. 777.)
5. A case in which the defendant was found guilty of "lewd and lascivious association and cohabitation," in which the evidence was held to be wholly insufficient to sustain the verdict of the jury. (p. 777.)

6. The form of indictment given for "lewd and lascivious cohabitation," in Mayo's Guide, held to be insufficient, and disapproved.

Writ of error to a judgment of the circuit court of the county of Boone on an indictment for lewd and lascivious cohabitation, rendered on the 20th day of September, 1879, against James Foster, allowed upon the petition of said Foster.

Hon. David E. Johnston, judge of the ninth judicial circuit, rendered the judgment complained of.

WOODS, JUDGE, furnishes the following statement of the case :

The plaintiff in error was indicted in the circuit court of Boone county, at the spring term thereof 1877, for lewd and lascivious cohabitation with one Sarah Foster.

The indictment, which is an exact copy of the form in Mayo's Guide—pp. 409, 410, alleges "that James Foster on the 1st day of October, 1876, in the county of Boone, and from that day until the 14th day of April, 1877, in said county, did lewdly and lasciviously associate and cohabit with one Sarah Foster; the said James Foster and Sarah Foster not being married to each other during all the time aforesaid, against," &c.

To this indictment the defendant demurred, and the court overruled his demurrer. The case was afterwards tried upon an issue on the plea of *not guilty*, and the jury returned a verdict in these words, "We the jury find the defendant guilty, and assess his fine at fifty dollars."

The said defendant then moved the court to set aside the said verdict and award him a new trial, on the grounds that said verdict was contrary to the evidence; that he was taken by surprise by said trial and verdict and on the grounds that he had since the trial discovered new and material evidence. In support of his said motion the said defendant filed two affidavits, of himself, and another of the sheriff of said county which on their face show, that the newly discovered evidence, was in fact wholly immaterial. The defendant introduced

evidence, and the case was heard upon evidence of the witness offered by the State.

The court overruled the defendant's motion for a new trial, and rendered judgment on the verdict of the jury for fifty dollars fine and the costs. The defendant excepted to the opinion and judgment of the court in overruling his motion for a new trial, and the court certified the facts proved, which are as follows :

"That James Foster, the defendant, lived in Boone county within twelve months prior to the finding of this indictment, on White Oak branch of Big Coal river ; that Sarah Foster lived in a house, used as a kitchen, near the residence of said James Foster ; that she did the cooking and superintended affairs about the house ; all ate at the same table ; that said Sarah Foster had been employed as a cook by James Foster in Kanawha county, and they lived in Kanawha, before she came to Boone, in the same way as to rooms or houses, and in other respects, as they lived in the county of Boone ; that James Foster moved to Boone county from Kanawha several years ago ; that Sarah Foster's husband died about the close of the war ; that James Foster had lost his wife about the same time, and had children living with her ; the youngest one was one year old ; the oldest fourteen years old ; they did call James Foster "dada" sometimes. The witness for the State, Steve Asberry, who was the only one introduced, went to James Foster's early one morning, and saw James Foster in his own bed in his house, and Sarah Foster was in bed in the kitchen ; he never saw any indecent or lascivious familiarity between them. And the State rested her case, and the defendant introduced no evidence. And these were all the material facts proved at the trial."

To this judgment the defendant obtained a writ of error to this Court, alleging in his petition therefor, that the said circuit court erred in overruling his said demurrer, and his said motion for a new trial.

Laidley & Laidley for plaintiff in error.

Attorney-General Watts for the State.

WOODS, JUDGE, announced the opinion of the Court :

The offense intended to be alleged against the defendant is described in section 7 of chapter 149 of the Code in these words, "If any persons not married to each other, lewdly and lasciviously associate and cohabit together * * * * * they shall be fined not less than fifty dollars, and may, at the discretion of the jury, be imprisoned not exceeding six months." The associating and cohabiting "together" as used in this section necessarily import sexual commerce between such persons, as if they sustained towards each other, the relation of husband and wife. It is not intended to describe or punish, secret or single acts of incontinency between such persons, though they may occur more than once; such acts, if the persons, both, or one of them be unmarried, are acts of fornication in such persons, and if one or both of them be married to a third party, are acts of adultery in such married person, and are punishable under the sixth section of said chapter of the Code, and they are not otherwise indictable, unless accompanied with such publicity, as of itself makes them indictable at common law. *Anderson v. Commonwealth*, 5 Rand.; *Commonwealth v. Isaacs and West*, 5 Rand. 634; Bish. Cr. Law sec. 379; *Commonwealth v. Catlin*, 1 Mass. 8.

To constitute the offense, with which the defendant is sought to be charged in said indictment, it is not sufficient, that he and said Sarah Foster, not being married to each other, during such association and cohabitation, should so associate and cohabit "together," but it is essential, that both *he and said Sarah Foster* should "*lewdly and lasciviously cohabit together*," and that they should both have the same common purpose and intent; for if this purpose and intent were present in the mind of one, and were wholly absent from the mind of the other, then it cannot be said they *both*, "*lewdly associated and cohabited together*," and therefore they cannot be guilty of the offense of "*lewdly associating and cohabiting together*" described in said clause of said section 7 of chapter 149. In that case however, one, of said persons might be guilty of adultery or fornication. If the offense consisted simply in cohabiting with each other, not being married to each other, one might be guilty and the other innocent; one

might be insane, or the form of a marriage ceremony might have been adopted, which one of the parties might believe valid and binding, while the other having a husband or wife living, might know it to be void. Here one might be acting in perfectly *good faith*, and without guilty knowledge and therefore, without lewdness or lasciviousness, and the cohabitation not being lewd and lascivious as to *both*, neither is guilty of this particular offense. *Delany v. The People*, 10 Mich.

The offense intended to be charged against the defendant being the creature of the statute, deriving all of its peculiarities from the phraseology of the statute, would have been best described in the words thereof, and while it is not essential to use the very words of the statute to describe the statutory offense, yet it is essential that every fact and intent entering into, and constituting the offense, must be substantially set forth in the indictment. This, being one of that class of offenses which cannot be committed by one person alone, without the concurrent act of another, it follows that the indictment must distinctly allege such concurrent act on the part of such other person. *State v. Helm*, 6 Mo. 263; *State v. Byron*, 20 Mo. 210. The demurrer in the case at bar, raises two interesting questions, which ought to be determined. First, can an indictment be sustained against one of the guilty parties without joining the other, in other words can the parties charged with such an offense, be indicted separately, or must they be indicted jointly? and secondly, are the allegations in the indictment in this case, sufficient to charge the defendant James Foster with the offense of lewd and lascivious cohabitation with said Sarah Foster?

When two or more persons join in the commission of a crime, all the parties participating therein are guilty, and so is each of them, whether the crime is such that it may be committed by one person, or where it is of that class which requires the concurrent acts of others, as in cases of fornication, adultery, conspiracy, riot, lewd and lascivious cohabitation and many others. Crimes are joint and several, and all participants therein, are severally liable to the full punishment prescribed for the offense. 1 Bish. Cr. L. §§ 629, 630, 631. *Reg. v. King*, 1 Salkeld. Hence it follows, that where parties are indicted and convicted, either jointly, when all

are tried together, or when indicted jointly and tried at different times, or indicted and tried separately, each one incurs the full penalty; and the fact that one of them has suffered that penalty, does not in any manner operate as a satisfaction of the guilt of another. One is not less guilty, because another is equally guilty; each receives the same punishment as if he alone had committed the offense. 1 Bish. Cr. L. §§ 954, 955.

That joint offenders may be jointly indicted, and tried, or tried separately, and convicted, is well settled. That it has been the settled practice to sustain separate indictments against parties charged with fornication and adultery, is equally well established; but this rule has sometimes been called in question, when it has been applied to other offenses, in the commission of which the concurrent acts of a specified number of persons, are required to constitute the offense, as in cases of conspiracy, where at least two, and in riots, where at least three are required to commit those offenses. It is insisted that the case at bar presents another illustration of this objection, as the offense in this indictment cannot be committed without the concurrent act of another, accompanied with all the other circumstances and conditions prescribed by the statute creating the offense.

In prosecutions for adultery, the weight of authority is, that the two participants may be joined in the same indictment, or they may be indicted and tried separately, and the same rule is applied to prosecutions for fornication. Whar. Cr. L. §§ 1730, 1721. Bishop in Statutory Crimes sections 670, 671, 672, lays down the same doctrine, "Parties in a case of adultery, may be indicted separately, or together (jointly) at the election of the power that prosecutes;" and also in cases of fornication, "it is a general rule that the parties to this offense, as in adultery, may be indicted separately, at the election of the pleader," but whether the indictment be joint or several, it must be distinctly alleged therein, that the act charged, was the joint, concurrent act of both under the conditions necessary to constitute the offense. It has been maintained in the case at bar, that as the offense of lewd and lascivious cohabitation, cannot be committed by one alone, but requires the concurrent act of two, with the lewd and lascivi-

ous intent of both, that it cannot come within the rule just laid down in cases of adultery, &c., and that therefore the parties to such offense cannot be indicted separately and must be indicted jointly, and that for this cause the said indictment against James Foster alone, for lewd and lascivious cohabitation with Sarah Foster, cannot be sustained. This question has never been passed upon in this State, or in any of the reported cases in Virginia. We therefore deemed it proper to carefully examine the reported cases in many of the States, and the result of this examination and of the examination of reliable text writers is, that it is more proper to indict the offenders jointly; yet as in adultery and fornication, they may be separately indicted. So, the same rule prevails in this, as in those cases. Whar. Cr. L. § 1748; Bish. St. Crimes § 708; *State v. Tom.*, 2 Ired. 580.

But it is to be always borne in mind, that where one is separately charged, it must be averred, that another concurred with him in the commission of the offense; as Bush. Cr. Pro. § 225, Bish. Stat. Cr. § 170—that not being “married to each other,” they both, lewdly and lasciviously cohabited “together,” or with “each other,” for unless these elements exist in both, and concur in the commission of the unlawful sexual commerce, neither of them can be guilty of the “*lewd and lascivious cohabitation*” required by the statute to constitute this offense. *State v. Tom.*, 2 Ired. 569. This question has frequently arisen in prosecutions for riot, and conspiracy, where the crimes have been committed by the accused, and the requisite number of other parties, who were either unknown or could not be apprehended, but in every such case, it has been held essential, that the indictment should allege that the defendant, together with the requisite number of other persons, whether named or unknown, did every act, with every intent and purpose, and under every condition, necessary to show that such absent parties, as well as the party indicted committed the act charged in the indictment, and all these facts must be proved on the trial, and a general verdict of guilty against the party thus separately indicted, necessarily finds that such absent parties or at least a number of them sufficient to commit the offense, were also guilty, for if they did not so find they would have found the defendant not guilty.

The only case reported in Virginia for lewd and lascivious cohabitation, is that of the *Commonwealth v. Isaacs and West*. In this case the grand jury found a *presentment* against David Isaacs and Nancy West "for outraging the decency of society and violating the laws of the land by cohabiting together in a state of illicit commerce as man and wife, without being lawfully married," &c. The defendants were summoned to show cause why an information should not be filed against them and the court adjourned to the general court the following question, "whether admitting the facts presented by the grand jury to be true, an information will lie for the said offense?" The general court decided that the information would lie against the defendants, for lewd and lascivious cohabitation, but as they were *jointly* presented, the question of a separate information was not considered.

In the case of *Hutchins v. Commonwealth*, 2 Va. Cas. 331, Wm. Fankerly and Nancy Hutchins were jointly indicted, charging that said "William unlawfully, willingly and incestuously did *intermarry* with, and take to wife a certain Nancy Hutchins the niece of said William and that the said William and Nancy then and there from, &c., to &c., did willingly, unlawfully and incestuously continue to cohabit and live together as man and wife, against," &c. Both were convicted, and upon a writ of error, it was objected that the indictment was bad, because it did not in terms allege that she had intermarried with said William; the court held the indictment good, "because it was impossible for him to intermarry with her unless she also intermarried with him, and that as the said indictment was in the very words of the statute, it was therefore sufficiently certain," and affirmed the judgment. The only remaining case from Virginia is the *Nicholas and James's Case* reported in 7 Gratt. 589—but as the parties were jointly indicted, and the indictment charged that from, &c. to &c., they did, without being married to each other, lewdly and lasciviously associate and cohabit *together*, being the very words used in the statute, the indictment was held good.

In the case of *Delany v. People*, reported in 10 Mich. 241, the question raised by the demurrer, in the case at bar, arose there and was fully considered by the supreme court of Michigan, and in an able and exhaustive opinion, by Christiancy.

justice, they reached a conclusion, that is conclusive upon the question raised by the demurrer in this case although we are unable to adopt all the conclusions of the court in that case, as we are of opinion for the reasons hereinbefore stated, that in a prosecution for lewd and lascivious cohabitation, the parties may be indicted *jointly* or severally, whereas the conclusion of the court in that was case that they "*must* be indicted jointly, and that they cannot be indicted separately, unless one of the parties be unknown or since dead." We fully concur in the conclusion of the learned judge that the crime does not consist merely in *associating* and *cohabiting*, nor that they so associated and cohabited "together" or with "each other," but *both* of them must *lewdly and lasciviously* associate and cohabit "together," or with "each other." In the case of *Delany v. People*, an information was filed against Delany charging, that "he on &c. from &c. to &c. in the city of Detroit did lewdly and lasciviously associate and cohabit with one May S., he and the said May S. not being then and there married to each other, contrary, &c." This charge was held to be insufficient for two reasons, first because it failed to charge they so associated and cohabited "together," and because the information ought to have been against them jointly and not separately against Delany. The statute of Michigan under which this charge was made, is almost identical with the seventh section of chapter 149 of our Code the words being, "If any man and woman not being married, &c., shall lewdly and lasciviously associate and cohabit together, &c."

The doctrine that the indictment must allege that the parties associated and cohabited together, is laid down, and ably supported by Mr. Bishop in Stat. Crimes, sections 702 and 721. Similar statutes exist in nearly all of the States, and so far as we have been able to discover, the same rule of construction exists, but we have not been able to find any case in which the court has gone so far, as in *Delany v. The People*.

Applying the principles here established to the case at bar we are of opinion that the allegation of the indictment that the said "James Foster, on &c., in the said county from that day to &c. did lewdly and lasciviously associate and cohabit

with one Sarah Foster, the said James Foster and Sarah Foster not being married to each other during all the time aforesaid" is not equivalent to saying that they during that time lewdly and lasciviously associated and cohabited "*together*" as the statute has it, or with "*each other*," which would be equivalent words, because in the absence of such words, for aught that appears in the indictment she may be entirely innocent of the "*lewd and lascivious*" commerce, which is the distinctive feature of the statutory offense; as has been suggested, she might be insane, or she might in good faith believe she was only discharging towards the man she believed to be her husband, the duties of a wife. Because therefore, said indictment fails to allege that the said James Foster and Sarah Foster lewdly and lasciviously associated and cohabited "*together*" or "*with each other*," we are of opinion that the circuit court erred in overruling the defendant's demurrer to said indictment.

The only remaining question presented by this record is whether the facts certified to have been proved upon the trial are sufficient to warrant the verdict of the jury. While under ordinary circumstances the Court is slow to interfere with the verdict of a jury, where there is any conflict in the facts certified, or any testimony from which the jury might properly have deduced the defendant's guilt, yet in a case where there is a total absence of any sufficient evidence to support the verdict the Court will not hesitate to set it aside, as wholly unwarranted.

The State upon the trial of this indictment offered only the testimony of a single witness, whose whole statement is certified as all the facts proved,—and the defendant offered no evidence on his part, very properly concluding that as the State had failed to make any case against him, it was unnecessary to offer any evidence in his defense. If Sarah Foster and James Foster had, during all the period mentioned in said indictment resided under the same roof, eaten at the same table; and if she had nursed and cared for his children, who some time called him "*dada*,"—all this may have been done, without any criminality between the parties, and without giving just cause of suspicion to the most fastidious. In this case, Sarah Foster was hired to do his housework; she

had a separate house where she slept; she was never, so far as this testimony shows, seen or known to be in his bedroom at night, nor he in hers, at improper hours, or under suspicious circumstances. The only witness examined, proves that they had so lived for several years; that he was at James Foster's house, early one morning, and he found him in his own bed, in his house, and her, in her own bed, in her house, and that he never saw any indecent or lascivious familiarity between them.

There is therefore in the facts proved and certified to us, no sufficient evidence to support the said verdict, or even to show any impropriety or indelicacy of conduct between the defendant and the said Sarah Foster. On the contrary every fact proved is perfectly consistent with the innocence of the defendant. It therefore seems to the Court here, that the court erred in refusing to set aside said verdict, and award the defendant a new trial; for which additional reason, the judgment aforesaid, should be reversed.

It is therefore considered by this Court, that the said judgment of the circuit court, be, and the same is wholly reversed and annulled; and this Court, now proceeding to render such judgment as the said circuit court ought to have rendered, doth further consider, that the defendant's said demurrer be, and the same is sustained, and that the said defendant from the said indictment be discharged and go thereof without day.

THE OTHER JUDGES CONCURRED.

JUDGMENT REVERSED.

WHEELING.

STATE OF WEST VIRGINIA v. BEASLEY.

Submitted February 3, 1883—Decided April 28, 1883.

1. A verdict of guilty, found upon an indictment, under section 1 of chapter 107, Acts 1877, which charges a sale of "spirituous liquors, wine, beer," &c., in which the proof was that the defendant sold "a glass of liquor" for "ten cents," will not be set aside

by the Appellate Court upon the ground that the proof was insufficient to warrant such verdict. (p. 779.)

2. Our statute—Code, chap. 13, § 12—which declares that, "The time within which an act is to be done shall be computed by excluding the first day and including the last; or, if the last be Sunday, it shall also be excluded," applies to the construction of statutes in criminal as well as civil cases. (p. 779.)
3. An indictment for a misdemeanor is found against B. on June 3, 1879, and the evidence proves that the offense charged was committed on June 3, 1878, the prosecution is not barred by the statute of limitations. (p. 781.)

Writ of error to a judgment of the circuit court of the county of Raleigh, rendered on the 6th day of November, 1879, on an indictment against Robert Beasley for the unlawful selling of spirituous liquors, allowed upon the petition of said Beasley.

Hon. Evermont Ward, judge of the ninth judicial circuit, rendered the judgment complained of.

The facts of the case are stated in the opinion of the Court.

No appearance for plaintiff in error.

Attorney-General Watts for the State.

SNYDER, JUDGE, announced the opinion of the Court:

At a term of the circuit court of Raleigh county held on the 3d day of June, 1879, an indictment was found against Robert Beasley for a misdemeanor, which charges that the said "Beasley, on the 4th day of June, 1878, in the said county, did without a State license therefor, sell, offer and expose for sale, spirituous liquors, wine, beer," &c.

On the sixth day of November, 1879, the defendant pleaded not guilty, a trial was had by jury and a verdict of guilty returned fixing the fine against the defendant at ten dollars and fifty cents, and the court entered judgment for said fine and the costs. On the day following the defendant moved the court to set aside said verdict and judgment upon the ground that the verdict was contrary to the law and the evidence, which motion the court overruled and the defendant excepted and tendered his bill of exceptions which is

made a part of the record. The bill of exceptions shows, that the State proved by Thomas Arnold, the only witness in the case, "That on the evening of the third day of June, 1878, late in the evening, at Raleigh Court House, in the county of Raleigh, he, in company with others, were starting home, and called at the house of the defendant to get a drink of liquor; that the defendant furnished him a glass of liquor, for which he paid him "ten cents;" that witness was before the grand jury of said county on the first or second day of the June term, 1879, of the circuit court of Raleigh county, and testified to the facts stated above." These were all the facts proved in the case.

From the judgment aforesaid the defendant obtained a writ of error to this Court.

Two grounds are relied on by the plaintiff in error to reverse the said judgment of the circuit court. The *first* is, that the proof was insufficient to warrant the finding of the jury; and the *second*, that the alleged offense was barred by the statute of limitations.

The only criticism made upon the insufficiency of the proof, and the only one to which it is at all susceptible, is, that, while the indictment charges a sale of "*spirituous liquors, wine, beer,*" &c., the proof is simply that the defendant sold "*a glass of liquor.*" Taking the word "*liquor*" in connection with the attendant facts, that the witness "*called at the house of defendant to get a drink of liquor; that the defendant furnished him a glass of liquor for which he paid him ten cents,*" it seems to me that the terms used are very suggestive of something stronger than water; and in my opinion the proof was sufficient to warrant the jury in finding that the defendant was guilty of selling intoxicating liquor of some kind. It would certainly be exceeding the legitimate power of this Court to set aside the verdict of the jury in such a case after it had been approved by the circuit court.

Was the offense barred by the statute of limitations? Our statute provides, that "*a prosecution for a misdemeanor shall be commenced within one year next after there was cause therefor, &c.*" Code, ch. 152, sec. 10 p. 700.

It is a general rule that criminal statutes are to be con-

strued strictly as against defendants and liberally in their favor; and in cases not especially excepted therefrom, the statute of limitations comes within this general rule—Bish. on Stat. Cr. § 259. But the class of misdemeanors to which the one at bar belongs is specially excepted from this general rule of construction. For section 44 of chapter 107 of the Acts of 1877, under which act this indictment was found, declares that: "The provisions of this chapter shall in all cases be construed as remedial and not penal"—Acts 1877 ch. 107 § 44. This being then a remedial statute, it must, under the rule for construing such statutes, be construed largely and beneficially, so as to suppress the mischief and advance the remedy—Sedgw. on Constr. Stat. 309. In this case the clear purpose of the statute is to suppress the illicit sale of intoxicating liquors; such construction should, therefore, be given to it by the courts as will advance that purpose.

Where the computation of time, as prescribed in statutory enactments, is to be made from an act done, much controversy has taken place as to whether the first day—that on which the act is done—is to be included in the reckoning. The earlier English cases included that day. But in *Lester v. Garland*, 15 Ves. 248, the day was excluded, and it was intimated that no general rule existed. The more recent decisions, however, both in England and the United States, seem to have established the rule, where it is not fixed by statute, of excluding the day on which the act was done and including the last day of the prescribed limitation, except where the statute requires specially a given number of entire days to intervene, in which case both are excluded—3 Chit. Pr. 109; *Pitt v. Shev*, 4 Barn. & Ald. 208; *The People v. N. Y. Central R. R. Co.* 28 Barb. 284; *Com. v. Maxwell*, 27 Pa. St. 444; *Lang v. Phillips*, 27 Ala. 311; *Owen v. Slatter*, 26 Id. 547.

In *The State v. Asbury*, 26 Tex. 82, it was held, the day, on which the act was done, must be included or excluded according to the circumstances of the case, so as to effect the intention of the parties. In that case, which was similar to the one at bar, the day was included and the prosecution declared barred.

But whatever may be the general rule elsewhere, the rule

in this State is fixed by the Legislature. In our Code, under the heading, "Certain Rules for the Construction of Statutes," it is declared that: "The time *within* which an act is to be done shall be computed by excluding the first day and including the last; or, if the last be Sunday, it shall also be excluded"—Code, chap. 13 sec. 12 p. 92.

It has been suggested that this statute is intended to apply exclusively to civil cases. But it is not so qualified. It is general in its terms and I can see no good reason why it should not apply to criminal as well as civil cases. The mode of computing time in any particular case, or class of cases, is much less important than that there should be some uniform rule on the subject. I think it was the purpose of the Legislature to have the same rule of computation in all cases, criminal as well as civil. It is not for the public interest that there should be two rules, or that the rule should be less certain in criminal than it is in civil cases. It is better that the practice of the courts should be uniform. Even on general principles, the statute in this case being remedial, the day on which the offense was committed, would have to be excluded. But in our opinion the rule fixed by the statute should be followed in the construction of all statutes, except in those specially excepted.

The date of the finding of the indictment was the commencement of the prosecution and the statute of limitations ceased to run from that date. *Christian's Case*, 7 Gratt. 631. Excluding, then, the 3d day of June, 1878, the day on which the offense was committed, the indictment found on the 3d day of June, 1879, was "within one year next after," the 4th day of June, 1878, the day on which the statute commenced to run, and the prosecution was not barred.

The judgement of the circuit court must, therefore, be affirmed with costs and thirty dollars damages.

THE OTHER JUDGES CONCURRED.

JUDGMENT AFFIRMED.

WHEELING.

STATE OF WEST VIRGINIA v. LOWE.

Submitted June 22, 1883—Decided June 30, 1883.

1. The twelfth section of chapter 152 of the Code of West Virginia in so far as it authorizes a crime to be prosecuted and punished in a county, in which the offense was not committed, when the crime was committed within one hundred yards of the boundary-line of the county, is unconstitutional, null and void, it being in conflict with article III. section 14 of our Constitution. (p. 786.)
2. A judgment will be reversed, where the court below in an instruction excepted to has assumed a material fact, unless the record shows affirmatively, that the fact so assumed was admitted expressly or tacitly, or that it was so fully sustained by uncontradicted evidence as to necessitate the inference that it was an undisputed fact. (p. 794.)
3. Where a person other than a regular judge has tried a case below, and no objection was made on the trial to his authority, and the record is silent as to the mode of his appointment or selection, no objection to his authority can be raised in the appellate court for the first time provided, that under the Constitution and laws he could have been elected or appointed to sit as judge in such case, as the appellate court will in such case presume, that he was legally elected or appointed. (p. 784.)

Writ of error to a judgment of the circuit court of the county of Calhoun, rendered on the 26th day of October, 1881, upon an indictment against Nimrod Lowe for a violation of the revenue laws by selling spirituous liquors without a license, allowed upon the petition of the State.

Hon. William E. Lively, special judge, rendered the judgment complained of.

GREEN, JUDGE, furnishes the following statement of the case:

The grand jury of Calhoun county, on February 22, 1881, on their oaths presented, that in July, 1880, in said county Nimrod Lowe did unlawfully and without a State license therefor sell, offer and expose for sale spiritous liquors, wine, porter, ale, beer, and drinks of a like nature. The defendant pleaded not guilty to this presentment, and on October

21	786
35	91
21	786
37	815
21	789
43	469
21	782
49	72
49	726
21	782
65	102
65	415

26, 1881, the jury found the defendant not guilty as alleged; and the court entered up a judgment thereon, that the defendant from further prosecution on this indictment be discharged and go thereof without day.

There is copied into the record what is called a bill of exceptions, there having been placed on the record-book a memorandum, that "upon the trial of this cause the State of West Virginia, by the prosecuting attorney of this county, tendered her bill of exceptions to certain opinions and rulings of the court given against her upon the said trial." This paper called a bill of exceptions is in the words and figures following:

"Be it remembered, that upon the trial of this cause, and after the evidence and argument of counsel had been fully heard, and before the jury had been instructed to retire to consider of their verdict, the prosecuting attorney having introduced evidence tending to show that the defendant had sold spirituous liquors, on the 3d day of July, 1880, in the county of Roane, but within one hundred yards of the boundary line between the counties of Roane and Calhoun. and the defendant having offered no evidence of a State license to him to sell spirituous liquors, wine or alcohol in either of the said counties, the prosecuting attorney moved the court to instruct the jury as follows:

"PLAINTIFF'S INSTRUCTION.

"If the jury believe from the evidence that the defendant sold spirituous liquors without having a State license therefor within one year next preceding the finding of this indictment, and within one hundred yards of the boundary line of the county of Calhoun, then the jury should find the defendant guilty, and assess his fine at not less than ten nor more than one hundred dollars.

"To which instruction the defendant, by his attorney, objected, and the court sustained the objection and refused to give the said instruction to the jury, and on the motion of the defendant, by his attorney, the court instructed the jury as follows:

"DEFENDANT'S INSTRUCTION.

"The court instructs the jury that inasmuch as the evi-

dence for the State shows that the offense was committed within the county of Roane, within one hundred yards of the county line of Calhoun county, and the indictment failing to show on its face that the offense was committed in Roane county, within one hundred yards of the county line of Calhoun county, they should find the defendant not guilty; further, that a conviction on the indictment in this case could not be pleaded in bar of a prosecution against the defendant for the same offense in the county of Roane.

"To which instruction the prosecuting attorney objected, but the court overruled the objection; to which opinion and rulings of the court in refusing to give the instruction asked on behalf of the State, and in giving the instruction asked on behalf of the defendant, the State, by her prosecuting attorney, excepted and tendered this her bill of exceptions, which is signed, sealed and ordered to be made a part of the record.

"WM. E. LIVELY [SEAL.]"

The State of West Virginia by Robert G. Linn, prosecuting attorney of Calhoun county, presented a petition for a writ of error to said judgment, which was allowed by this Court on December 10, 1881; and the case was submitted to the decision of this Court on the argument of the counsel for the defendant in error only.

No appearance for the State.

John M. Hamilton for defendant in error relied upon § 14, Art. III. of the Constitution.

GREEN, JUDGE, announced the opinion of the Court:

The first question presented by this record is, whether this Court consider the bill of exception signed by Wm. E. Lively as a part of the record. This Court takes judicial notice, that Wm. E. Lively is not a circuit judge in this State. The record in this case begins thus: "Pleas before Honorable William E. Lively, elected and qualified a special judge of the circuit court of Calhoun county, held at the court house, on Wednesday the 26th of October, 1881." And the certificate attached to it is signed by the clerk of the circuit

court of Calhoun county and certifies, "that the foregoing is a full, perfect and complete transcript of the records of the proceedings had in said court in the case of the State of West Virginia against Nimrod Lowe."

So far as the record in this case discloses there is nothing to show how William E. Lively was appointed or by what authority he acted as judge; but the proceedings in the lower court are presumed to have been regular in this respect, unless the contrary affirmatively appears upon the record. It is only therefore incumbent on us to enquire, whether or not under any circumstances by the laws of this State, he could have properly acted as judge in the trial of this case. His election or appointment and regular qualification will be presumed, the record not showing anything to the contrary, provided such election or appointment and qualification to try the case were warranted by the Constitution and laws of this State. See *Sweptzer v. Gaines et al.* 19 Ark. 96; *Vandever et al v. Vandever et al.* 3 Met. (Ky.) 137; *Feaster v. Woodfill*, 23 Ind. 493. We know that the regular term of the circuit court of Calhoun county in the year 1881 began on October 25, 1881, or should regularly have been commenced on that day, and therefore, that the 26th day of October, 1881, would have been or might have been during a regular term of said circuit court. Now in *The State of West Virginia v. Williams*, 14 W. Va. 851, syl. 1, this Court decided, that under the legislation of this State a special judge might be elected by the members of the bar to hold the *general* term of a circuit court, where from any cause the judge fails to appear or if present cannot preside, and that such legislation when applied to a general term of a court was constitutional. As this case was or might have been tried at a regular term, we must on the principles I have laid down presume, that Wm. E. Lively was legally and constitutionally elected and qualified as a special judge, and that he was authorized to try this case, nothing to the contrary appearing in the record, and that therefore the bill of exceptions signed by him constitutes a part of the record. So regarding it what was called the plaintiff's instruction was properly refused, for section 14 of article III. of our present Constitution, following in this respect section 8 of article II. of our

first Constitution, see Code of W. Va. p. 21, and Acts of 1883, p. 145, provides that: "Trials of crimes and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, *and in the county where the alleged offense was committed*, unless upon petition of the accused and for good cause shown, it is moved to some other county." And neither in our first nor in our present Constitution, nor in any amendment of it, is there any provision for the trial of such a misdemeanor as that, for which the defendant was prosecuted in this case, in any other county than the one, in which the alleged offense was committed.

This provision of our Constitution confers on a person accused of crime, with reference to the place where he is to be tried, the privileges, which the common law conferred on him, thus making these common law privileges of the accused constitutional rights, which the Legislature cannot take from him without his consent. There never has been a question as to the fact, that all the privileges conferred on the accused by these constitutional provisions were also conferred on him by the common law. For by the common law crimes of every description could only be prosecuted in the county wherein they were committed; but if an impartial trial could not be had in that county, the case might certainly be removed at the instance of the accused, and it might be perhaps at the instance of the State. But under the constitutional provision which we have cited it is obvious, that the venue can never be changed at the instance of the State without the consent of the accused; but as these constitutional privileges were conferred for the benefit of the accused they can be waived, and the venue can be changed on his motion or by his consent. See *Commonwealth v. Parker*, 2 Pick. 550; *State v. Potter*, 16 Kans. 80; *Dula v. The State*, 8 Yerg. 511; *Perteet v. The People*, 70 Ill. 171; *State v. Denton*, 6 Cold. 539; *Wheeler v. The State*, 24 Wis. 52. The provision of our Constitution above quoted would seem clearly to confer on the accused the right in all cases to be tried in the county wherein it is alleged, that the crime was committed, and it would therefore seem to follow necessarily, that any act of the Legislature, which permitted the State without the consent

of the accused to prosecute him in any other county than the one, in which the crime was alleged to have been committed would be unconstitutional, null and void.

The object of the constitutional provision is to protect the accused against a spirit of oppression and tyranny on the part of the government, and against a spirit of violence and vindictiveness on the part of the people; and also to secure the accused from being dragged to a trial at a distant part of the State, away from his friends, witnesses and neighborhood, and thus be subjected to the verdict of mere strangers, who may feel no sympathy, or who may cherish against him animosity or prejudice, and also to protect the accused from injustice arising from his inability to procure proper witnesses, and to save him from great expense. See *State of Minnesota v. Robinson*, 14 Minn. 454, and 2 Story on Con. sections 1780-81.

The Legislatures of different States have not regarded statute-laws, which permit offenses within short specified distances of county lines to be presented in either county as violating the real spirit of the common law, or of constitutional provisions, more or less, like the provision of our Constitution, which we have quoted. The evil intended to be corrected by such statutes was, that where crimes were committed on or near a county line, it might turn out in the proof, after a fair and expensive trial had fully established the guilt of the accused, that the indictment was in the wrong county, and the prosecution would be defeated on that ground alone; and thus a few yards might save great offenders from punishment. See *Wm. Armstrong et al. v. The State*, 1 Coldwell's R. 341. Therefore there has very properly been shown a disposition by the courts to sustain such statutes, and it has been done whenever there was in the Constitution any provision, which could be construed as conferring any discretion on the Legislature as to the venues for the trials of crimes. But on the other hand courts have been compelled in some of the States to hold such statutes as null and void, because they were in direct conflict with the Constitution. See *State of Minnesota v. Robinson*, 14 Minn. 447; *Armstrong v. The State*, 1 Cold. R. 338; *Dougan v. State*, 30 Ark. 41.

Section eight of the Bill of Rights of Virginia of 1776 provided: "That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation; to be confronted with the accusers and witnesses; to call for evidence in his favor; and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty; nor can he be compelled to give evidence against himself; that no man be deprived of his liberty except by the law of the land or the judgment of his peers." This Bill of Rights was again prefixed to the Virginia Constitution of 1830 without a change, and was made a part of the Constitution of 1850 with scarcely any change and with no change in this eighth section. And as amended in 1850 it was incorporated into the Constitution of Virginia of 1864, and with slight additions again incorporated into the Constitution of Virginia of 1870; this eighth section never having been changed in Virginia. On March 14, 1848, the Legislature of Virginia adopted what was called a criminal Code, and by chapter 9 section 7 thereof it was provided, that "Any offense committed on the boundary of two counties or within one hundred yards of the dividing line between them, may be alleged in the indictment to have been committed and may be prosecuted and punished in either county." See Acts of 1847-48 p. 122. This has been continued as the law, slightly changed in its wording, ever since both in Virginia and West Virginia. See Code of Virginia of 1860, ch. 199 § 13 p. 813; Code of West Virginia, ch. 152 § 12 p. 700. There have been no decisions in either State as to the constitutionality of this law. I presume it will be held constitutional in Virginia, as the words of the Bill of Rights and of the Constitution of Virginia only required, that crimes shall be tried in the *vicinage* of the place where committed, and not in the *county* where committed; and in Massachusetts, where the Constitution speaks of the *vicinity* of where the offense is committed as the venue of the trial; and it was decided in the *Commonwealth v. Parker*, 2 Pick. 550, that the word *vicinity*, as here used, was not the equivalent of *county*. And I presume it would be held in Virginia, that the word *vicinage* in their Constitution was not equivalent to *county*; and if the crime was committed within one hundred yards of

a county line, under the above statute it could constitutionally be tried in either county.

In fixing the venue for the trial of crimes the provisions of our Constitution were similar to those of Virginia, but in the Constitution of Virginia, of 1875 the word county is substituted for the vague word "vicinage." In article 6 of the amendments of the Constitution of the United States substantially the same provisions were inserted as are found in section 9 in this Virginia Bill of Rights, except that the venue instead of being the *vicinage*, as in the Virginia Bill of Right, is "the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

In the Constitutions of a number of States their Bill of Rights, adopts the language of this amendment to the Constitution of the United States except, that the venue is fixed in the county or district where the crime was committed, instead of the "State or district," and some of them omit the words "the district shall have been previously ascertained by law." As instances of this we may refer to the Constitutions of Kansas, Illinois, Tennessee, Wisconsin, Ohio and Minnesota. In this last State this constitutional provision has been interpreted. Section 6 of article I. of their Constitution provided: That "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have previously been ascertained by law." And section 20 of chapter 108 of their General Statutes provides: That "offenses committed on the boundary-lines of two counties on within one hundred rods of the dividing line between them, may be alleged in the indictment to have been committed in either of them, and may be prosecuted or punished in either county." This is substantially the same as our statute law, except we have substituted one hundred "yards" for one hundred "rods." In *The State of Minnesota v. Robinson*, 14 Minn. R. p. 447, the court decided, that this statute was not in conflict with their Constitution. This conclusion was however rather hesitatingly reached. No authorities were referred to really sustaining it; the authorities referred to

being English, New York and Massachusetts laws. Of course the English authorities are entitled to no consideration on this question, as Parliament has a right of course to pass such a statute, there being no Constitution to restrain it in this matter. The New York cases are also entitled to no consideration, as the Constitution has in it no clause fixing the venue in criminal cases. The Massachusetts cases are also entitled to scarcely any weight on this question, as their Constitution if it can be considered as in any way fixing the venue in criminal cases, can only be regarded as requiring it to be in the "vicinity" of the place, where the offense was committed. See *Commonwealth v. Parker*, 2 Pick. 549. But whatever weight this Minnesota decision may be entitled to in States whose Constitutions are similar to this, it is entitled to very little if any weight in this State, whose Constitution in this respect, differs largely from theirs.

By the terms of our Constitution article 3 § 14 p. 7 of Acts 1872-3 the venue in all criminal cases is, the "county" where the alleged offense was committed. While by the Minnesota Constitution this venue was not confined to the county where the crime was committed, but might be extended to the district, which might include many counties. The Constitution of Minnesota provided for dividing the State into six districts, and for establishing in each district a court presided over by the same judge, who should have original criminal jurisdiction; and thus a crime could be punished by a trial in a county, which might be at a considerable distance from the county, in which the crime was committed, and by a jury none of whom might be from such county. The court, in *State of Minnesota v. Robinson*, 14 Minn. 452, refer to this and base their decision in part on this peculiarity of the Minnesota Constitution, which is not to be found in ours, in which the boundaries of a county are necessarily the boundary of the jurisdiction of all courts having original jurisdiction in criminal cases. We conclude, therefore, that this Minnesota decision is entitled to but little weight with us in reaching a conclusion in the case before us.

The language of the Tennessee Constitution of 1834, Art. I., § 9, is: "In all criminal prosecutions the accused shall have a right to a speedy public trial by an impartial jury of

the county or district, in which the crime shall have been committed." See Poor's Charters and Constitutions, Part 2, p. 1678. In this Constitution there is no provision for district courts having original criminal jurisdiction, but like our Constitution all courts having original jurisdiction in criminal cases were in their jurisdiction limited to the boundaries of their respective counties, including the circuit courts. This is referred to in *Armstrong et al. v. The State*, 1 Coldwell 342, where the court say, that this word "district" in this provision of their Constitution fixing the venue in criminal cases was unmeaning, it having been carelessly copied from their previous Constitution; and if the word district is thus disregarded as unmeaning, this Tennessee Constitution in so far as it fixes the venue in criminal cases is the same as ours; and in this case of *Armstrong v. The State*, 1 Coldwell's R. 338, the court decided, that a provision in their Code, § 4976, which provided, that "when an offense is committed in the boundary of two or more counties or *within a quarter of a mile thereof*, the jurisdiction is in either county" was unconstitutional, null and void, it being in conflict with their Constitution, which they interpreted to be in this respect the same as ours. This case is directly in point, and is entitled to great consideration by us, especially as the court reached this conclusion reluctantly, and only because they regarded the law as being in direct conflict with their Constitution. (See page 342.)

The Constitution of Arkansas provided that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the county, in which the crime has been committed, &c." This is substantially the provision in our Constitution. The revised statutes of Arkansas, see Gantt's Digest, section 1648 provided: "When the offense is committed on the boundary of the counties, or *within a half a mile of such boundary*, or if it is uncertain where the boundary is, the indictment may be found and a trial had in either county." In *Dougan v. State*, 30 Arkansas, R. 41 the court decided, that so far as the act invested the court with jurisdiction of crimes committed beyond the limits of the county it was unconstitutional, null and void. This decision is directly in point, in the case be-

fore us. In the case of *The State v. Rhoda*, 23 Ark. 158, the court said: "Cases may occur, in which the crime may be committed on the boundary between two counties, &c. In such cases it would certainly be a narrow construction of the provision of the Bill of Rights in relation to venues to hold, that the offender would not be subjected to indictment at all."

The first Constitution of West Virginia departing from the Bill of Rights, which had always constituted a portion of all the different constitutions of Virginia instead of providing, that the venue in all criminal cases should be in the *vicinage* of the place, where the crime was alleged to have been committed provided, that "the trial of crimes and misdemeanors, unless herein otherwise provided, shall be by jury, and shall be held publicly and without unreasonable delay, in the *county* where the alleged offense was committed, unless upon petition of the accused for good cause shown, or in consequence of the existence of the war in such county, it is removed to or instituted in some other county." See Code of West Virginia, p. 21; Art. II., § 8 of Constitution. This provision slightly modified was continued in our present Constitution of 1872. See Art. III., § 14, page 7. It is now worded thus: "Trials of crimes and misdemeanors, unless herein otherwise provided, shall be by a jury of twelve men, public, without unreasonable delay, and in the county where the alleged offense was committed, unless upon petition of the accused, and for good cause shown, it is removed to some other county." But despite this constitutional privilege, the statute-law of Virginia with reference to the venue in the prosecution of crimes committed within one hundred yards of a county line was continued on our statute-books. It is thus worded in the Code of West Virginia: "An offense committed on the boundary of two counties, or within one hundred yards thereof, may be alleged to have been committed, and may be prosecuted and punished in either county. Code of W. Va. ch. 152, § 12, p. 700; Code of Va. of 1860 p. 813. This law so far as it authorizes the prosecution of a crime in a county, in which it was not committed, provided the crime is committed within one hundred yards of the county line is in direct conflict with the express

provisions of our Constitution above quoted, and is therefore unconstitutional, null and void. And however convenient this statute may be, and however essential it may be, that such provisions should be made so as to insure in certain cases the convenient and certain punishment of offenders in certain cases, it can not stand if in direct conflict as it is with our Constitution. In the language of the court in *Armstrong v. The State*, 1 Coldwell 342, slightly modified, "Criminals have their rights. Some of them are enumerated in this section of our Constitution. They must be secured as effectually as other constitutional rights; one of these rights is to be tried by an impartial jury 'of the county,' in which the offense is alleged to have been committed. This legislative provision is, that he shall not in all cases have that right, but that he may be presented by a grand jury and tried by a jury of a different county in the given case. If it be no infraction of this right, when the place of the crime is within one hundred yards of the county line, it would not be if it were ten miles distant. The words 'unless herein otherwise provided' cannot vary the case. It was carried into our present Constitution by copying from the old, and is unnecessary, as in no case is 'it otherwise provided' in our present Constitution; nor was it otherwise provided in our old Constitution in the cases coming within this statute."

The conclusion which we have reached is fully sustained by *Armstrong v. The State*, 1 Coldw. 338, and *Dougan v. The State*, 30 Ark. 41, and is not in conflict with any case I have seen, and especially not with the *State of Minnesota v. Robinson*, 14 Minn. 447. For that case while it held such a statute was not in conflict with their Constitution, yet it was so held because of provisions in their Constitution, which are not to be found in ours. The court below did not therefore, in the case before us, err in refusing to give the plaintiff's instruction. Such instruction was not law, unless this statute-law was constitutional and operative, which it is not. But the court did err in granting the defendant's instruction in the form, in which it was worded. I do not mean to say, that the law is not set forth correctly in this instruction asked by the defendant, but that it is so worded as to make the court say to the jury, "that the evidence of the State shows,

that the offense was committed within the county of Roane within one hundred yards of the line of the county of Calhoun." This may be so and it is not improbable that it was, though of this we know nothing, as the evidence has not been certified by the court below. But it was obviously the duty of the jury, and not of the court to determine, whether on the evidence the offense was committed, and if so, whether it was committed in Calhoun county or in Roane county. And it was a palpable invasion of the province of the jury for the court thus to tell them what was proven by the evidence, and that on the facts thus assumed by the court to have been proven, they must find the defendant not guilty. The court ought never to intimate in any way, much less to say positively to the jury, that the guilt or innocence of the defendant has been proven. This is a palpable error on the part of the court, who in giving instructions should be careful not to assume any material fact as proven. The court ought not in a charge or in an instruction to assume material things as facts, or to put them in an instruction in such a shape as to intimate to the jury what the judge believes is proven by the evidence; and if this be done it is error, for which the judgment will be reversed. *Whilly v. State of Georgia*, 38 Ga.; *McDonnell's Ex'r v. Crawford*, 11 Gratt. 377; *State v. Robinson*, 20 W. Va.

It is true that in *Sheff et ux. v. The City of Huntington*, 16 W. Va. p. 307, syl. 9, this Court decided, that "when there is an assumption of a fact in an instruction given to the jury, and the evidence which is certified as to the correctness of the assumption is so full and uncontradicted as to necessitate the inference, that it was undisputed or tacitly admitted, the judgment will not be reversed because the fact was so assumed to be true." But, that the fact assumed in this instruction asked by the defendant, that is, that the "offense in this case was committed in the county of Roane and not in Calhoun county" cannot be regarded by this Court as an undisputed fact or as one tacitly admitted, and as "fully sustained by the evidence as to admit of no question." On the contrary there is nothing in the record to show; that this fact was proven by the evidence or admitted by the defendant. Nor can we say, that the jury

was not influenced in drawing the conclusion, that this fact was proven by the unauthorized expression of opinion by the court, that this fact was proven. The instruction, which the court should have given in lieu of this instruction asked by the defendant is, "that if from the evidence the jury believes that the offense named in the presentment was committed not in Calhoun county but in Roane county, the jury must find the defendant not guilty, even though they believe the evidence proves, that the offense was committed within one hundred yards of the county line of Calhoun county." The latter part of this instruction, "that a conviction on the indictment in this case could not be pleaded in bar of a prosecution against the defendant for the same offense in the county of Roane," ought not to have been given. We express no opinion whether it lays down the law correctly or not, but it ought not to have been given because it was a matter with which the jury had nothing to do. Their duty would have been precisely the same, whether the defendant could or could not have been again prosecuted. This portion of this instruction was therefore about a matter entirely foreign to his case, and it ought not to have been given.

The judgment of the circuit court, rendered on Wednesday, the 26th day of October, 1881, must be therefore set aside, reversed and annulled, and the plaintiff in error must recover of the defendant in error his costs in this Court expended, and this Court proceeding to render such judgment as the court below should have rendered, it is therefore considered, that the verdict of the jury be set aside because of the misinstruction given them by the court and a new trial is awarded, and this case is remanded to the circuit court of Calhoun county to be there proceeded with according to the principles laid down in this opinion, and further according to law.

THE OTHER JUDGES CONCURRED.

JUDGMENT REVERSED. CASE REMANDED.

WHEELING.

STATE OF WEST VIRGINIA v. VEST.

Submitted June 19, 1883—Decided June 30, 1883.

1. A record imports such absolute verity, that no person against whom it is pronounced will be permitted to aver or prove anything against it. (p. 800.)
2. The record to which such absolute verity is imputed consists not only of what is written on the record-book and authenticated by the signature of the judge, but it also consists of all indictments, pleadings and papers referred to by the record-book and thereby made a part of the record. (p. 800.)
3. But if a record is interlined or erased in a material matter and it is alleged, that this was done after the record was made, by some unauthorized person, such alteration constitutes no part of the record, and an enquiry may be made into the genuineness of such altered record, and it may be proven by parol, that such alteration was thus made by one not authorized to make it. This is not controverting the absolute verity of the record, but simply enquiring as to what really constitutes the record. If this were not allowed, the absolute verity attributed to a record could be used to give sanction to a forgery or to a fraudulent erasure of the record. (p. 801.)
4. When a record is thus to be restored to its original and true form, the proper mode of doing it is by a motion, which can be made even after the case, in which the record is made, has been removed to the Appellate Court; but such motion can only be made in the court below, in which the record was made up. (p. 801.)
5. Though a record appears to have been interlined or erased, its verity can not be assailed incidentally or in any other court, but only in the court where the record is made, and then only when it is directly called in question by a motion to correct it. (p. 802.)
6. When a record has been thus restored to its original and true form, the record will in all other proceedings be taken in its corrected and not in its falsified form. (p. 802.)
7. If an indictment for felony found by a grand jury has omitted to charge, that the criminal act done was done feloniously, and after the grand jury is discharged the word "feloniously" is in-

21	796
34	5
21	796
35	225
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41	739

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47	52

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49	82

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55	10

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56	401

21	796
164	388

serted in the indictment so as to render it in form a good indictment, when before it was fatally defective, and the defendant pleads *not guilty*, and the jury find a verdict against him, he may then move the court to have the indictment restored to its original and true form, and when so restored judgment may be arrested for the fatal defect in the indictment. (p. 808.)

8. If in such an alleged case the court below refuses to hear the evidence offered to prove such unauthorized interlineation of the word "feloniously," the Appellate Court will reverse the judgment entered upon such verdict, and will remand the case with instructions to the court below, on such motion, to hear the parole evidence and restore the indictment, if it has been changed, to its original and true form, and then to determine the motion in arrest of judgment, treating, in deciding such motion, the indictment, on which the defendant had been tried as if at the trial it had been in its true and original form. (p. 808.)

Writ of error to a judgment of the circuit court of the county of Randolph, rendered on the 30th day of September, 1882, on an action against Charles Vest for felony in said court then pending, allowed upon the petition of said Vest.

Hon. R. F. Fleming, judge of the sixth judicial circuit, rendered the judgment complained of.

GREEN, JUDGE, furnishes the following statement of the case:

On the 16th day of September, 1882, the grand jury of Randolph county presented an indictment against Charles Vest, which was endorsed "a true bill," which endorsement was signed by the foreman of the grand jury. The record states, that it was an indictment against Charles Vest for a felony. The indictment is now apparently in the following words:

"STATE OF WEST VIRGINIA, RANDOLPH COUNTY, TO-WIT:

"IN THE CIRCUIT COURT THEREOF,)
"September Term, 1882.)

"The grand jurors of the State of West Virginia in and for the body of the county of Randolph and now attending the circuit court of said county, upon their oaths present that Charles Vest, of said county, on the — day of July, 1882, in the county aforesaid, one silver watch and chain of the value of twenty-six dollars, of the goods and chattels of one A. P. T.

Wilson, then and there being found, feloniously did steal, take and carry away against the peace and dignity of the State of West Virginia.

“Found upon the evidence of John Mann, A. P. T. Wilson, Martin Pfan, J. J. Buckley, G. W. Buckley, J. D. Wilson and A. W. Suiter, witnesses sworn in open court and sent before the grand jury to testify at the instance of the prosecuting attorney.

“CYRUS H. SCOTT,

“*Prosecuting Attorney.*”

It was after the verdict and before the judgment claimed by Charles Vest, that the word feloniously, interlined in the indictment, was interlined after the grand jury was discharged, but before the plea of not guilty was put in. The defendant being unable to procure counsel, and desiring the assistance of counsel, the court assigned him counsel. He pleaded not guilty on the trial, and on September 30, 1882, the jury found this verdict: “We, the jury, find the prisoner, Charles Vest, guilty of grand larceny in manner and form as charged in the indictment.”

The defendant by his counsel moved the court to arrest the judgment against him upon this verdict, because the indictment and the record thereof were not sufficient. He alleged, that the indictment had been changed by inserting the word “feloniously” therein after the same had been returned by the grand jury and after said grand jury had been discharged, and before the prisoner’s arrangement on said indictment and his plea of not guilty thereto; and the prisoner in support of his motion offered to introduce witnesses to prove, that the said word “feloniously” had been so interlined and written into the said indictment, after the finding thereof and the discharge of the grand jury; that the court upon the inspection of the record and the said indictment, to which the defendant had pleaded “not guilty,” considered the same to be sufficient and refused to arrest the judgment, and also refused to allow the prisoner to prove, that the said indictment had been so altered and changed by interlining and writing therein the word “feloniously” as aforesaid. To which action of the court the prisoner excepted, and his bill of exceptions setting forth these matters was signed, sealed and enrolled as a part of the record.

The court rendered a judgment, that said Charles Vest be imprisoned in the penitentiary of this State for the term of three years, the period fixed by the court. And it was ordered, that the sheriff of said county do as soon as possible after the adjournment of the court remove and safely convey said Charles Vest from the jail of the county to the said penitentiary therein to be left imprisoned and treated in the manner directed by law. And thereupon he was remanded to jail, and at his instance the execution of said judgment was suspended for thirty days in order to allow him to present a petition to this Court for a writ of error and *supersedeas* to said judgment. Such petition was presented and allowed October 21, 1882. And it being now represented to this Court by an *amicus curiæ* that the defendant was without counsel in this Court, he being unable to employ counsel, and it being asked, that his case might be submitted to this Court for its decision, though no arguments had been made or submitted on the part of the State or by the defendant, as is required by the rules of this Court, and it appearing to this Court, that the prisoner is in jail and unable to employ counsel, and that he desired his case to be acted on now by this Court, and as it is now ready for hearing, except that no arguments of counsel have been filed and docketed in this Court for hearing since last January, this Court assents, under the circumstances, to take up and decide the case, though its rules have not been complied with.

No appearance of counsel for either party.

GREEN, JUDGE, announced the opinion of the Court :

There are so far as appears no errors in the proceedings in this case unless, the court below erred in refusing on the motion of the prisoner to allow him to offer evidence to prove, that the word "feloniously" had been interlined in said indictment after the same had been returned by the grand jury and after the grand jury had been discharged, but prior to the prisoner's pleading "not guilty." The record on its face shows, that the word "feloniously" had been inserted by interlineation in the indictment; but of course it does not appear, whether this was done before or after the grand jury

acted upon this indictment; and the only question really in this case is, whether the circuit court erred in refusing to permit the prisoner to prove by witnesses, that this interlineation was made after the grand jury had acted upon the indictment and had been discharged and in refusing to arrest the judgment. It seems to me, that it would be a reproach to our jurisprudence if a material allegation could be inserted in an indictment after it had been found by a grand jury to the prejudice of a party, and that such alteration of an indictment could because it is a part of record in no manner be considered, as this would amount to depriving the accused of the protection given him by the Constitution, that the indictment must be found by a grand jury.

It is certainly a rule invariably recognized by the courts, that a record imports such absolute verity, that no person against whom it is pronounced will be permitted to aver or prove anything against it. This rule is well established, and we now here refer to but a few of the many cases, in which this doctrine has been held. See *Rex v. Carlile*, 2 Barns. Ad. 971; 23 Eng. Ch. R. 226; *Reitzenberger v. Braden*, 18 W. Va. 280; *Carper v. McDowell*, 5 Gratt. 212, 226; *Harkins v. Forsyth*, 11 Leigh 24; *Taliaferro v. Pryor*, 12 Gratt. 277; *Vaughn et als. v. The Commonwealth*, 17 Gratt. 386; *Quinn et als. v. Commonwealth*, 20 Gratt. 138. Whatever therefore on the face of a book of record has been duly authenticated by the signature of the judge, must be held to be an absolute verity, and it cannot be contradicted; and so also any paper actually referred to on the record-book as filed or as constituting a part of the record is to be regarded as a part of the record, and is as much a verity as if it had been spread out at length as a part of the record. But it is only that which was actually on the record-book, when thus authenticated or that is actually contained in some paper so made a part of the record by reference, that is thus held to be an absolute verity. And therefore if after a record is made up and duly authenticated by the signature of the judge, any addition is made to such record fraudulently by any interlineation made by another, this false and fraudulent interlineation constitutes in fact no part of the record, and evidence introduced to prove, that such interlineation was falsely and fraudulently

made by one not authorized to make the same, is really not an impeachment of the verity of the record, but is simply proving, that such fraudulent interlineation was really never a part of the record. The absolute verity attributed to a record cannot be used to give sanction to a forgery or to a fraudulent erasure of the record. And accordingly the authorities show, that where a record has been falsified by erasure or interlineation it may on motion be amended, or more properly speaking it may be restored to its original condition. The reason assigned for this in the old books is, "because the wickedness of any person in completing the records of the courts ought not to obstruct its justice or prejudice any of the parties."

The authorities sustaining these views are most of them very ancient. The first case I find is, *Whiteing v. Abbington*, 2 Roll. R. 80-81 decided about 1620, in which judgment was rendered against Abbington and Mary, his wife, but afterwards the word Mary was erased from the records. Nevertheless execution was issued on the judgment, as it was originally, and Mary Abbington brought a writ of error in the exchequer chamber alleging, that there was no judgment against her. But when this writ of error was pending a motion was made in the court below to amend the record, or more properly speaking, to make in the record-book an entry stating what had been erased from the original record, and that the court had changed the erased record by restoring the words which had been erased; and this was done and approved by the appellate court, and it had corrected accordingly the transcript of the record, which had been sent and certified to it, before it had been corrected in the court below on motion.

Judge Tucker in *Bias et al. v. Floyd, Governor*, 647-648, reviews this case, and I think correctly deduces from it these principles: First, that if a record has been altered by erasure or interlineation by some unauthorized person, the court will upon motion restore it to its original and true form; Second, that this correcting of the record can only be made in the court whose record it is, and not in the appellate or any other court; Third, that when a record has been thus interlined or erased its verity cannot be questioned, in-

cidentally in any other proceeding, but the verity of what is an apparent record can only be brought in question directly by a motion to correct it, or more properly to restore the record to its original condition; and lastly, when it has been thus corrected or restored to its original form in any other proceeding, it will be taken in its corrected or original form and not in its falsified form. These principles were recognized in our ancient books and decision as correct, and seem to have been almost undisputed, nor have they been controverted so far as I have discovered in the more modern decisions.

The modern decisions firmly maintain the ancient rule laid down by Lord Coke in 1 Inst. 260, "*that the rolls being the records or memorialls of the judges of the courts of record import in them such incontinrollable credit and veritie, as they admit no averment, plea or prooffe to the contrarie.*" But the record, which is thus held to be an absolute verity is the record as it was originally authenticated by the signature of the judge. And there is nothing in the principles laid down in *Whiteing v. Abbington*, 2 Roll. 80, that is in conflict with this principle laid down by Lord Coke, and universally followed in the modern decisions. For the principles established in the decision in Rolle's Reports do not permit the original record, authenticated by the judge's signature, to be altered by proof that its statements are false, but simply allows it to be proven, that what is this original record apparently authenticated by the signature of the judge was not in point of fact the record, which had been so authenticated by the judge, but that by a forgery, an interlineation or erasure that is now falsely made to appear to be such record, which never was in fact a record, and never had been so authenticated by the signature of the judge. The principles laid down in said case reported in Rolle's Report are recognized as correct. See Roll. Abr. title Am. § 5, 209, and in Vin. Abr., under title Am. and Jeofails; 2 Vin. Abr. 312; also in Bacon's Abr. vol 1 title Am. and Jeofails (4) p. 259.

In *Foster and Taylor's Case*, Poph. R. 196, it was decided in an action of ejectment the court below amended a record which had been altered without proper authority though when so amended the case was pending in an appellant

court on writ of error the character of the alteration made in this case does not appear in this report of the case but it does appear in Bacon's Abr. vol. 1 p. 259, title Am. and in Jeofails p. 259, where it is thus stated: "In *ejectione firmæ* the leave was made the 10th of May; after verdict for the plaintiff it was made the 11th of May by a rasure; and it appearing to the court, that the declaration was vitiated by the said rasure they amended it both in C. B. and B. R." I understand from this, that the declaration in the suit was after verdict changed by erasing May 10 and substituting May 11, which resulted in vitiating the judgment of the court. After a writ of error had been taken to this judgment, the record was amended in the court below by restoring the true date of the leave as it was originally in the declaration, May 10; and this was approved by the appellate court. This case shows, that the rules we have stated as deducible from the case of *Whiting v. Abington*, 2 Roll. 80, 81, are as applicable to a change made fraudulently in a declaration or indictment as they are to those made on the record-book, for such declaration or indictment is as much a part of the record when referred to in it, as are the entries on the record-book itself. So it is stated in 2 Vin. Abr. 312, and in Bacon's Abr. vol. 1 p. 225, that where it appeared in a *venire facias*, that *Chumbry* was erased and made *Henily* the record was amended and restored to its original state. Bacon in his Abridgment vol. 1 p. 259, thus states the law: "If any part of the record be vitiated by rasure the court will restore it by amendment, because the wickedness of any person in corrupting the records of the court, ought not to obstruct the justice of the court or prejudice any of the parties." And he inclines to the opinion though it is doubted, that the person who makes such fraudulent erasure is guilty of felony, even though it be afterwards corrected by the court making such amendment and the record is then restored to its original state.

These views expressed by the old law writers and in the reports were approved by the court of appeals of Virginia in *Bias et al. v. Floyd, Governor*, 7 Leigh 640. In that case the State issued a *scieri facias* to enforce the amount due on a recognizance conditioned, that one Hagar should appear on

the first day of the next term of the superior court of law of Kanawha county to do and receive what should be enjoined him by said court *on a charge of having feloniously passed certain counterfeit money and for having counterfeited the same*, which recognizance had been broken and forfeited. A plea of no such record was filed, and the oyer was prayed of the recognizance and the *scieri facias* demurred to. And then a rule was awarded on certain affidavits to show cause why the recognizance should not be suppressed and held void, and the further prosecution of the *scieri facias* discontinued. This rule was discharged, the demurrer overruled and judgment given against the defendant on the plea of no such record. The affidavits showed, that the words above italicised or words equivalent to them had been interlined in the recognizance after it had been taken by the justice of the peace, and that after such interlineation it had not been acknowledged or seen by the defendants, who were not informed that such interlineation was made. The court of appeals reversed the judgment discharging the rule, and the judgment on the *scieri facias*, and remanded the cause to said circuit court with directions to amend the recognizance according to the right of the case, and then to proceed to a new trial of the *scieri facias* upon the defendant's plea of *nul tiel record*. The court treated the recognizance as a record, and held, that on the rule or on a motion it could by an order of the court be amended, or more properly restored to its original form before its interlineation, and if it was in fact interlined after the recognizance was taken in the manner claimed, the recognizance should be restored to its original form and when so restored, it being materially different from the recognizance described in the *scieri facias*, the judgment would have to be rendered for the defendant on the plea of *nul tiel record*. The views taken by the court were those hereinbefore expressed, and Judge Tucker, who delivered the opinion of the court referred to and approved the old English authorities, which I have cited.

This case meets our approval, and especially the four deductions drawn by Judge Tucker from the case in 2 Roll. R. p. 80, 81, which we have in substance stated. It may be said, that in this case there was no distinct motion made to

correct the indictment or to restore it to the condition in which it was before the alleged interlineation of it. But the record as we have set it out discloses substantially, that the court below was asked to hear the evidence to prove, that this indictment was interlined, after it was proved by the grand jury, in a material matter indicated, and the court refused to hear such evidence. And this motion of the defendant was in connection with a motion in arrest of judgment, which motion must have been sustained provided the court on hearing the evidence had ordered the indictment to be corrected by striking out the interlined portion, as being no part of the indictment found by the grand jury, it having been interlined subsequently.

We therefore consider, that there was as shown by this record substantially a motion to strike out of the indictment this interlined portion, as constituting no part of the indictment or record; and therefore, that the correct mode of proceeding has been substantially adopted by the defendant in this case, and we may remark here, that in the case of *Bias et al. v. Floyd, Governor*, 7 Leigh 640, there was, as in this case, no formal motion to strike out the interlineation as constituting no part of the record and restore the recognizance to its original condition, yet the court of appeals proceeded just as if there had been such formal motion. The irregularity in this respect is no greater in the case before us than it was in the case in 7 Leigh, and we shall disregard it as was done by the court of appeals of Virginia in that case. This formal motion to restore this indictment to its original form and to make an entry of such restoration in the record-book could be even now made in the circuit court of Randolph, as we have seen, and this Court could not decide this case till an opportunity was afforded to make such formal motion. But we think, this motion has been substantially made already, and that the circuit court of Randolph has substantially refused to entertain such motion or to hear any evidence in support of the same, and has substantially dismissed it; and therefore we consider, that there is no necessity for postponing the decision of this case in order that such formal motion may be made.

It is very obvious that the interlineation in this case, that

is the words "feloniously," made a most material alteration in the indictment, if such interlineation was really made after the grand jury found the indictment and had been discharged; and that unless these words were in the indictment as found by the grand jury, the indictment is fatally defective, and the judgment on the verdict of the jury must be arrested, as on such an indictment no judgment could be rendered against the defendant. The fact, that the record-book says, that "the grand jury presented an indictment against Charles Vest for a felony" would not properly speaking, be contradicted by proving, that the word "feloniously" was interlined, after the grand jury had found this indictment, but it would thus be shown, that the indictment upon which he was tried was inconsistent with the original indictment as actually found by the grand jury; and this original indictment, as so found and endorsed by the foreman of the grand jury, is as much a part of the record as is the entry on the record-book signed by the judge. The calling of the offense set out in the indictment a felony on the record-book is stating a legal deduction not a fact; and if the word "feloniously" was not used in the original indictment, even this legal deduction was erroneously drawn by the court.

The judgment of the circuit court rendered on this verdict must therefore be set aside, reversed and annulled; and this case must be remanded to the circuit court of Randolph county with instructions to hear any testimony, which may be introduced to prove, that the word "feloniously" had been interlined after the indictment had been found by the grand jury and after they had been discharged, and after hearing all the evidence on each side in reference to the alleged alteration of the indictment after it was found, the court shall by an entry of record correct the indictment so as to make it correspond with the indictment as found by the grand jury; or if in its present form the indictment is the same as that found by the grand jury, and it has not since such finding been so interlined or altered, then it shall make an entry on its record to that effect; and the court after it has thus restored the indictment to the form, in which it was when found by the jury or has determined, that it is now in

such form, it shall proceed to determine the motion of the defendant in arrest of judgment regarding the indictment as of the form, which the court upon this evidence shall determine it to have been, when the indictment was found by the grand jury.

THE OTHER JUDGES CONCURRED.

JUDGMENT REVERSED. CAUSE REMANDED.

INDEX.

ABANDONMENT.

- 1 A party, who is in possession of lands under claim of title, makes it his as against the world except as to the true owner, and it remains his as against all persons entering without his consent, unless he abandons the land ; and he may recover the possession of the land by a writ of unlawful entry and detainer, even of the true owner, who has entered upon the same without the occupant's consent and without his abandonment of such land. *Mitchell et al. v. Carder*, 277.
2. If such person in possession of such land leaves it with the intention of returning and taking possession of it at a future time, he does not abandon such land, even though no one be upon the land for a considerable length of time. An abandonment takes place, only when one in possession leaves with an intention of not again resuming possession ; for abandonment is a question of intention ; and mere lapse of time does not constitute abandonment, though it is proper to be considered in ascertaining the intention of a party, who has left land, which he has been occupying. *Id.*
3. So too the promptness or delay of a former occupant in instituting suit or demanding possession of one, who has entered on the land, is proper evidence to be considered in ascertaining such intention of the first occupant ; and indeed a wide range should be allowed, for it is generally only from all the surrounding facts and circumstances, that the intention of an occupant of land can be ascertained, when he has left its possession. *Id.*
4. But if such an occupant of land having no valid title has in point of fact so abandoned the possession of land with no intent of resuming it, then any one may take possession and hold it against him, even though he promptly institute proceedings to recover such possession ; but the burden of proving clearly such abandonment rests on the one who asserts it. *Id.* 278.

ABSOLUTE PAYMENT. See *Prom. Notes and Bills of Ex.*, 1.

ACKNOWLEDGMENT OF DEEDS.

A deed of trust is executed by a man and his wife to two trustees to secure a debt, the grantors in the deed acknowledge it before one of the grantees, a trustee, as a notary public, and on this acknowledgment it is admitted to record. **HELD :**

Such acknowledgment and recordation are invalid, and the deed is an absolute nullity as to the married woman, and is to be regarded as an unrecorded deed as to the male grantor. *Tavener v. Barrett*, 658.

See *Bonds*, 5 ; *Married Women*, 1-10.

ADMINISTRATORS. See *Principal and Surety*, 1 ; *Payment*, 1 ; *Insurance*, 4, 5, 6 ; *Personal Representatives*, 1.

ADVERSARY POSSESSION. See *Statute of Limitations*, 2.

AFFIDAVITS. See *Bonds*, 1, 3 ; *Attachments*, 2, 3.

AFTER-DISCOVERED EVIDENCE. See *New Trials*, 1 ; *Chy. Pl. & Pr.*, 1.

AGENT. See *Principal and Agent*, 1, 2.

ANSWER. See *Chy. Pl. & Pr.*, 5, 6, 7, 8.

APPEALS.

An appeal is awarded to a decree which does not adjudicate the principles of the cause, nor is it otherwise such a decree as can be appealed from to this Court, such appeal will be dismissed as prematurely and improvidently awarded. *Laidley v. Kline*, 21.

See *Chy. Pl. & Pr.*, 4 ; *Appellate Court*, 3, 4, 5.

APPELLATE COURT.

1. The court must be affirmatively satisfied that there is error in the judgment of the court below to the prejudice of the plaintiff in error before it can reverse such judgment. *Miller et al. v. Rose et al.*, 291.
2. In a proceeding, under section 29 of chapter 194 of the Acts of 1872-3, to remove gates erected across a public road, this Court will not reverse an order of the county court directing the removal of such gates upon the application of a person who appeared in the county court and objected to the proceeding unless the record affirmatively shows that such person is the owner or tenant of the lands on which said gates are erected, or that he is otherwise prejudiced by the removal of such gates. *Id.*
3. If an appeal or a writ of error has been twice dismissed by this Court because of the failure of the appellant or the plaintiff in

APPELLATE COURT (*continued.*)

- error to have the record printed, or to deposit the requisite money with the clerk of this Court to have the record printed within six months after the case has been docketed in this Court, the appellant or the plaintiff in error cannot have a third appeal or writ of error awarded to him. *Perry v. Horn*, 732.
4. A case is held to be docketed in this Court within the meaning of the law requiring the printing of the record, or the deposit of the money with the clerk for that purpose within six months after the case is docketed in this Court, from the day, on which the clerk of this Court issues the summons in the case. *Id.*
 5. A case, which has been dismissed by this Court may at a subsequent term be reinstated, if the case was dismissed because of surprise, accident or mistake. But such equitable considerations cannot be considered by this Court in deciding, whether when a case has been previously dismissed once or oftener, another writ of error or appeal can be granted. *Id.*
 6. A bill of exceptions in a criminal case, upon the refusal of the court to grant a new trial on the ground that the verdict is contrary to the evidence, certifies all the evidence and all the evidence for the prisoner is in conflict with that of the State so, that it is impossible that both can be true, the appellate court will reject all the evidence of the prisoner and look only to that of the State. *State v. Thompson*, 741.
 7. In reviewing the judgment of the court below in such cases, the appellate court will not reverse the judgment of the court below on the ground, that there is a doubt of its correctness; but it must be satisfied that the evidence is plainly insufficient to warrant the verdict. *Id.*
 8. Before this Court will reverse a judgment for the admission of evidence claimed to be improper, on an exception to such evidence, the exceptor must satisfy it affirmatively that an error to his prejudice has been committed by such admission. *State v. Yates*, 761.
 9. A verdict of guilty, found upon an indictment, under section 1 of chapter 107, Acts 1877, which charges a sale of "spirituous liquors, wine, beer," &c., in which the proof was that the defendant sold "a glass of liquor" for "ten cents," will not be set aside by the Appellate Court upon the ground that the proof was insufficient to warrant such verdict. *State v. Beasley*, 777.
 10. A judgment will be reversed, where the court below in an instruction excepted to has assumed a material fact, unless the record shows affirmatively, that the fact so assumed was admitted expressly or tacitly, or that it was so fully sustained by uncontradicted evidence as to necessitate the inference that it was an undisputed fact. *State v. Lowe*, 782.

APPELLATE COURT (*continued.*)

11. Where a person other than a regular judge has tried a case below, and no objection was made on the trial to his authority, and the record is silent as to the mode of his appointment or selection, no objection to his authority can be raised in the appellate court for the first time provided, that under the Constitution and laws he could have been elected or appointed to sit as judge in such case, as the appellate court will in such case presume, that he was legally elected or appointed. *Id.*

See *Chy. Pl. & Pr.*, 8, 9, 10.

ASSIGNMENT. See *Partners and Partnership*, 1, 3.

ATTACHMENT.

1. The remedy by attachment, being authorized alone by statute and in derogation of the common law, and, moreover, being summary in its effects and liable to be abused and used oppressively, its application will be carefully guarded by the courts, and it will be confined strictly within the limits prescribed by the statute. *Delaplain v. Armstrong*, 211.
2. The grounds for the attachment are the conclusions of the law. The "material facts," which the statute requires the affiant to state, are the allegations from which the court may be properly authorized to conclude that the grounds exist. Consequently an affidavit, which states that the debtor did an act or acts, which of themselves are not necessarily fraudulent, with an intent to defraud his creditors, without more is not sufficient. *Id.*
3. An affidavit in which the material facts, stated therein, were held insufficient to sustain the grounds of the attachment. *Id.*

ATTORNEY AND CLIENT. See *Principal and Agent*, 2.

BANKS AND BANK-OFFICERS.

1. The cashier of a bank, intrusted with the control and custody of its funds, will in a court of equity be held as a trustee for said bank and may be sued by it in such court and compelled to account for and pay any loss sustained by it, which was caused by any negligence or wrongful conversion or by any misapplication or use of any of its funds by such cashier in violation of the duties of his said trust. *Bank v. Jeffries*, 504.
2. Where a bill filed by a bank against its cashier for a settlement of his accounts as such only alleges, that the defendant was such cashier; "that during his term as cashier he lent sundry sums of money to sundry irresponsible persons without the consent of the board of directors of said bank, for which he is liable personally; and that the books and papers and cash-items show a large deficiency in the assets of said bank during the said cashier's term" of office; and said bill contains no averments,

BANKS AND BANK-OFFICERS (*continued.*)

that said bank sustained any loss by such unauthorized loans ; or that the moneys so lent have not been repaid ; or that said deficiency in its assets was caused by any act or negligence of such cashier, it is *clearly insufficient*; and a demurrer thereto ought to be sustained, because it presents no cause of action against said defendant. *Id.*

BILL OF EXCEPTIONS. See *Pl. & Pr.*, 18, 19 ; *Appellate Court*, 6, 7.

BILL OF PARTICULARS. See *Demurrer*, 3 ; *Pl. & Pr.*, 8.

BILL OF REVIEW. See *Chy. Pl. & Pr.*, 3.

BILL IN CHANCERY. See *Wills*, 1.

BILL TAKEN FOR CONFESSED. See *Default*.

BONDS.

1. A court of equity has jurisdiction to grant relief on a lost bond, but it generally requires an affidavit of the loss of the bond to accompany the bill. If the plaintiff fails to file such an affidavit, it may be supplied by filing it at any time before the hearing, and if this be done, the relief will be granted if the proofs in the case establish the loss of the bond. *Little v. Cozad*, 183.
2. The relief will be granted in such a case though it be proven, that after the institution of the suit, but before the hearing of the case, the lost bond was found, provided the plaintiff had used diligence to find it before the suit was brought ; and especially when the loss of it arose from its having been improperly in the possession of one of the obligors. *Id.* 184.
3. When a court of equity has jurisdiction of the case independently of the loss of bond, no affidavit need be filed of its loss. *Id.*
4. A bond of a special commissioner to make a sale in a chancery cause is delivered by the commissioner to the clerk of the court, and on its face it appears to be a complete and perfect bond, which was executed by the sureties upon the condition that it should not be delivered to the clerk till it was also executed by another person as surety, and when the clerk received the bond he was not informed of any such condition or of its being in any way conditioned. **HELD :**
This is a valid bond and the sureties cannot set up as a defense, when sued on it, this condition. *Id.*
5. It is not necessary to the validity of such a bond, that it should be either acknowledged or proven before the clerk. *Id.*
6. Such a bond must, as to the sufficiency of the sureties, be approved by the clerk, but in order to make the bond valid, he need not

BONDS (*continued.*)

endorse his approval upon it. This approval is sufficiently shown by the fact, that the bond had been properly filed away by the clerk, and by the commissioner of sale proceeding to collect the money, which the giving of such bond authorized him to collect. *Id.*

7. If a creditor agrees to give further time to his debtor on his giving a new bond with security, and he does give such new bond, but the name of the surety on it is a forgery, the creditor may sue the principal and his sureties at once on the old bond, and therefore they are not released by such an arrangement attempted to be made without his knowledge. *Id.*

BOOK OF ORIGINAL ENTRY. See *Evidence*, 3, 4, 5, 6, 7.

BURDEN OF PROOF. See *Abandonment*, 4; *Deeds*, 2.

CANCELLATION OF CONTRACT. See *Vendors and Vendees*, 13, 14, 15.

CASHIER. See *Banks and Bank Officers*, 1, 2.

CERTIFICATE OF ACKNOWLEDGMENT. See *Married Women*, 1-11.

CERTIORARI. See *Writ of Error*, 3.

CHANCERY PLEADING AND PRACTICE.

1. A bill for a rehearing is properly dismissed, that shows no error in law in the decree sought to be reheard nor after-discovered evidence, which could not have been discovered, before the decree was rendered, by use of reasonable diligence. *Hill v. Muury*, 162.
2. Where the answer insists, that new parties should be made defendants, because they have become interested in the land with the defendants, which land is sought to be subjected to the payment of the purchase-money, unless it appears that they were interested in the land, when the suit was brought, it is not error to decline to make them parties. *Id.* 163.
3. Where a number of persons purchased a large tract of land, and suit was brought to subject it to the payment of the purchase-money, and a deed is filed with the papers conveying the land to one of the defendants and reciting therein, that said defendant had purchased the interests of the others, and in the decree for the sale of the land this deed is recognized as filed, and in the same decree a personal decree is rendered against this defendant for a small balance of the purchase-money, and ordering the land to be sold, unless it was paid, and the said defendant files a bill of review, in which he does not object to the decree on this ground but virtually admits, that he alone is

CHANCERY PLEADING AND PRACTICE (*continued.*)

interested in the land, under these circumstances the personal decree against him is not to his prejudice. *Id.*

4. A purchaser of land under a decree in an attachment suit, who consented to the confirmation of the sale, cannot appeal from subsequent decrees in the suit for alleged errors or irregularities therein. His consent to the confirmation is a waiver of errors whether in the sale or in the decree of confirmation. And an appeal by the purchaser in such case will be dismissed as improvidently awarded. *Bank v Ewing*, 208.
5. An answer in this State may state such facts, as would be the basis of a cross-bill, and pray affirmative relief; and it then has the same effect, as a cross-bill formerly had. But this can only be done, when a cross-bill could have been properly filed; it can not ask such affirmative relief by introducing into it other matters distinct from those, which were stated in the original bill, and on which it was based, but it must be confined to matters involved in the original bill. *McMullen v. Eagan*, 234.
6. If therefore an injunction to a sale of lands by a trustee be asked in a bill, on the ground that the deed of trust was wholly inoperative to convey the grantor's land because of fatal defects in the deed of trust, the answer can not pray affirmative relief so as to operate as a cross-bill, when the prayer for relief is based on the fact, that the deed of trust was given to secure the purchase-money of the land, and the deed to the grantor in the deed of trust reserved a vendor's lien, which the answer prays may be enforced. In such case there would be brought into the answer as the basis of the prayer for affirmative relief matters distinct from those stated in the bill, which can not be done. *Id.* 248.
7. But if the bill of injunction goes further, and sets out this deed, in which the vendor's lien is reserved, and alleges, that it is fatally defective in not effectually conveying the contingent right of dower of a wife, who signed it, and alleges that more is for this and other reasons claimed to be due under the deed of trust than is really due, and such bill asks general relief, such affirmative relief by the enforcement of the vendor's lien may be asked in the answer; for such relief is confined to matters involved in the original bill. *Id.*
8. A party not named in the bill, but whose interest in the subject-matter of the bill only appears in the answer of a defendant, can not file an answer to the bill as a defendant, if his doing so without the bill being first formally amended is objected to by the plaintiff; and if the court permit such answer to be filed and afterwards render a decree against the plaintiff in favor of such party thus informally introduced into the case, the Appellate

CHANCERY PLEADING AND PRACTICE (*continued.*)

Court on the appeal of the plaintiff will reverse such decree. But where the record shows affirmatively, that the plaintiff was present in court when the party was thus informally introduced into the cause, and did not object but filed a replication to such answer, and the cause with reference to such new party was fully and fairly heard on its merits without objection in the court below, this will be regarded as a waiver by the plaintiff of such defect in the proceedings in the court below, and the Appellate Court will not reverse the decree for such defect in the proceedings. *Id.* 235.

9. The circuit court ought not to set aside a sale by a commissioner for inadequacy of price, when there had been two sales of the property previously, and the last sale was not made until after repeated adjournments by the commissioner of sale with a view to the getting of the highest possible price, merely because there was a slight apparent preponderance in the weight of the affidavits filed indicating, that the price obtained was not the full value of the property. When there is a conflict of views as to the value of property, previous sales and attempted sales are entitled to more weight than the mere opinions of some persons as to its value. *Id.*
10. If the name of the purchaser at such a sale be by mistake not named in a decree confirming such sale, but by mistake the name of some other person is inserted in the decree as the purchaser, such mistake is no ground for reversing the decree in the Appellate Court, if no motion to correct it has been made in the court below. *Id.*
11. Where a bill is filed against non-residents of the State and others, to which the said non-residents voluntarily appear and answer, and afterwards the plaintiff files in the cause an amended bill containing new and material averments affecting the interests of said non-residents. No appearance is entered by the non-residents to this amended bill and they were proceeded against by order of publication. Their appearance to the original bill does not affect their status as non-residents in respect to the allegations in the amended bill, and they have the right under the provisions of sections 26 and 30 of chapter 106 of the Code to have any decree entered in the cause after the filing of such amended bill, affecting their rights, re-heard without showing any excuse for their failure to make defense before such decree was entered. *Conrad v. Buck et al.*, 396.
12. The pendency of a suit in a foreign court, or the court of another State, will not prevent the institution and prosecution of a suit in the courts of this State for the same cause by the same party; nor will the pendency of such suit entitle a party to a stay of proceedings in a court of this State until the controversy can be determined in such foreign court. *Id.*

CHANCERY PLEADING AND PRACTICE (*continued.*)

13. A decree between co-defendants, can only be based upon the pleadings and proofs between the complainants and defendants ; and no decree can be made between co-defendants, founded upon matters not stated in the bill, nor in litigation between the complainants and defendants, or some of them. *Hoffman v. Ryan*, 415.

See *Deeds*, 2 ; *Banks and Bank Officers*, 2 ; *Statute of Limitations*, 4, 5.

14. A decree can not be made between co-defendants, unless it be based on pleadings and proofs between the plaintiffs and defendants. But in a bill asking, that the liens on a debtor's land be audited, and their amounts and priorities settled, and the debtor's land sold to pay the same, though the bill admits, that a particular debt is a lien and is unsatisfied, the debtor or any other lienor may dispute the validity of such lien, and such a controversy may be decided by the court without violating the above rule. *Tavener v. Barrett*, 658.

See *Demurrer*, 6, 7, 8 ; *Wills*, 1-5 ; *New Trial*, 1, 2 ; *Personal Representatives*, 1 ; *Bonds*, 1-4, 7 ; *Default ; Vendors and Vendees*, 1-5, 7, 8, 10, 12.

CHANGE OF VENUE.

1. Upon a motion for a change of venue counter affidavits may be read ; and if the court is satisfied from all the affidavits or other evidence for and against the motion, that the venue ought to be changed, it will in the exercise of its discretion remove the case, otherwise it will not. The exercise of this discretion is of course reviewable by the Appellate Court. *Railroad v. Applegate*, 172.

CO-DEFENDANTS. See *Chy. Pl. & Pr.*, 12, 13.

COLLATERAL SECURITY. See *Prom. Notes and Bills of Ex.*, 1.

COMMISSIONERS.

1. Commissioners are appointed to make sale of land under a decree of court, requiring them to give bond before proceeding to act. The sale is directed to be made for part cash and the residue on credit, and the sale is made as directed, the cash payment made to the commissioners and bonds executed by the purchaser to the commissioners for the deferred payments. The commissioners fail to give bond as required, and before the sale is reported by them or any order made for the collection of the sale bonds, the purchaser pays said bonds to the commissioners, who were also the counsel who had instituted and prosecuted the suit for the owners of the land sold and among whom the proceeds were to be distributed, but the purchase-money was never paid over to said distributees. **Held :**

COMMISSIONERS (*continued*).

- I. The said persons appointed commissioners had no authority to receive said purchase-money, either as commissioners or as counsel for the parties, and the purchaser is bound to pay it again.
- II. The commissioners, having received the money without authority, are liable in this suit to the purchaser for the amount so paid them, or either of them, with interest thereon from the time it was paid to them. *Donahue v. Fackler*, 124.
2. If after such process has been served on a special receiver, who by such decree had been authorized to rent out the real estate of the defendant, he proceeds to rent the same but announces publicly on the day of the renting, that if the Appellate Court on being applied to should hold such process effective, he would return to the renter his bond and repay his cash-payment and not report the renting to the circuit court, and the Appellate Court is satisfied, that he always intended to make such application to it to ascertain, whether such process was effective, before he placed the renter in possession of the property, and before he reported the renting to the court, it will not punish such special receiver for a contempt of the court because of such disobedience of its lawful process, the act of disobedience not having been consummated so as to injure any one, and no contempt being intended. *Hutton v. Lockridge*, 254.
3. But if the special commissioner in such a case delays to make an application to the Appellate Court to ascertain, whether such process was effective, and the defendant moves the court to issue a rule against him for contempt, the court, though declining to punish him for contempt, will adjudge against him the costs of the proceedings. *Id.* 255.
4. A commissioner's report, made in a cause rightly referred, on the face of which no error appears, will be presumed by the court as admitted to be correct by the parties, not only so far as it settles the principles of the account, but also in regard to the sufficiency of the evidence upon which it is founded, except in so far and as to such parts thereof as may be objected to by proper exception taken thereto before the hearing; and the court, at the hearing, is bound to observe this rule of equity practice. And it is error for the court, at the hearing, to remodel and restate the whole account stated in such report, and enter a decree on its own statement without reference to the account stated by the commissioner or the action of the parties in excepting or not excepting thereto. *Ward v. Ward*, 262.
5. If in any case the court is not satisfied with the report of a commissioner in regard to matters not excepted to which might be

COMMISSIONERS (*continued*).

affected by evidence *aliunde*, instead of remodeling the account on its own estimate of the evidence, it should re-commit the report with instructions indicating its opinion so that the respective parties might have an opportunity of meeting any objection thus suggested. *Id.*

6. If a report be made showing the liens on a debtor's land and their priorities, which the bill asks may be sold, and afterwards a demurrer to the bill is sustained, and an amended bill filed making a large number of lienor parties, who were not parties to the suit originally, such commissioner's report ought not to be confirmed, but a new order of reference should be made by the court to ascertain the liens. *Tavener v. Barrett*, 658.

See *Bonds*, 4, 5, 6; *Chy. Pl. & Pr.*, 9.

CONDEMNATION OF LANDS. See *Writ of Prohibition*, 5; *Eminent Domain*.

CONDITIONAL PAYMENT. See *Prom. Notes and Bills of Ex.*, 1.

CONFIRMATION OF SALE. See *Chy. Pl. & Pr.*, 4.

CONSTITUTIONAL LAW. See *Statute of Limitations*, 3; *Vendors and Vendees*, 20, 21; *Cr. Pl. & Pr.*, 7.

CONSTRUCTION OF STATUTES. See *Personal Representatives*, 1; *Writ of Prohibition*, 4, 5; *Appellate Court*, 1, 2; *Statute of Limitations*, 3; *Insurance*, 12-18; *Pl. & Pr.*, 15; *Married Women*, 13; *Pl. & Pr.*, 17; *Cr. Pl. & Pr.*, 6.

CONTRACTS. See *Vendors and Vendees*, 1-5, 13-19, 22, 23; *Pl. & Pr.*, 15.

CORPORATIONS.

1. Where the name of an individual appears upon the stock-book of a corporation as a stockholder, the presumption is that he is owner of the stock appearing in his name; and such book is proper evidence to go to the jury to show, that he was a subscriber to the capital-stock of the corporation. *Railroad v. Applegate*, 172.
2. A subscriber to the stock of a corporation cannot escape his liability to pay his subscription, on the ground that he did not pay the sum required to be paid by the statute at the time he subscribed. *Id.*

COSTS. See *Pl. & Pr.*, 1, 2, 3.

COVENANT. See *Pl. & Pr.*, 7.

CREDITORS' BILL. See *Widows*, 2.

CRIMINAL PLEADING AND PRACTICE.

1. Where, in an indictment under section 9 of chapter 144 of the Code, the word *feloniously* is used in characterizing the assault in the first part of the indictment and is joined by the copulative and the words, *then and there*, to the subsequent clause which charges the shooting or giving the wound, it is sufficient; and it is not essential that the word *feloniously* shall be again repeated before the allegation of the shooting or wounding in order to make it a good indictment for a felony. *State v. Yates*, 761.
2. An indictment under the seventh section of chapter 149 of the Code for "lewd and lascivious association and cohabitation," against one of the parties which only alleges that the defendant, on a certain day, and from that day to a certain other day, in the county, &c., did lewdly and lasciviously associate and cohabit with another person named in said indictment, said defendant and such other person not being married to each other during all that time, is fatally defective, because it fails to allege that the said parties so associated and cohabited "together," or "with each other." *State v. Foster*, 767.
3. Before a party can be convicted of "lewd and lascivious cohabitation," it must appear on the face of the indictment, that *both* of the parties participating in the offense, lewdly and lasciviously associated and cohabited "together" or "with each other." *Id.*
4. The parties who thus lewdly and lasciviously associate and cohabit together, may be indicted *jointly* or *separately*. *Id.*
5. The form of indictment given for "lewd and lascivious cohabitation," in Mayo's Guide, held to be insufficient, and disapproved. *Id.* 768.
6. Our statute—Code, chap. 13, § 12—which declares that, "The time within which an act is to be done shall be computed by excluding the first day and including the last; or, if the last be Sunday, it shall also be excluded," applies to the construction of statutes in criminal as well as civil cases. *State v. Beasley*, 777.
7. The twelfth section of chapter 152 of the Code of West Virginia in so far as it authorizes a crime to be prosecuted and punished in a county, in which the offense was not committed, when the crime was committed within one hundred yards of the boundary-line of the county, is unconstitutional, null and void, it being in conflict with article III. section 14 of our Constitution. *State v. Lowe*, 782.
8. If an indictment for felony found by a grand jury has omitted to charge, that the criminal act done was done feloniously, and after the grand jury is discharged the word "feloniously" is inserted in the indictment so as to render it in form a good in-

CRIMINAL PLEADING AND PRACTICE (*continued*).

dictment, when before it was fatally defective, and the defendant pleads *not guilty*, and the jury find a verdict against him, he may then move the court to have the indictment restored to its original and true form, and when so restored judgment may be arrested for the fatal defect in the indictment. *State v. Vest*, 796.

9. If in such an alleged case the court below refuses to hear the evidence offered to prove such unauthorized interlineation of the word "feloniously," the Appellate Court will reverse the judgment entered upon such verdict, and will remand the case with instructions to the court below, on such motion, to hear the parole evidence and restore the indictment, if it has been changed, to its original and true form, and then to determine the motion in arrest of judgment, treating, in deciding such motion, the indictment, on which the defendant had been tried, as if at the trial it had been in its true and original form. *Id.* 797.

CROSS-BILL. See *Chy. Pl. & Pr.*, 5.

DAMAGES. See *Negligence*, 1, 2, 6.

DECREES. See *Parties*, 1; *Appeals*, 1; *Chy. Pl. & Pr.*, 3.

DEEDS.

1. If a party obtains a deed for land without consideration upon a parol agreement, that he will hold the land in trust for the grantor, such trust will not be enforced, as it would violate the statute of frauds and the general rule of law, that parol evidence cannot be admitted to vary, add to or contradict a written contract. *Pusey v. Gardiner*, 469.
2. The burden of charging as well as proving fraud, mistake or misrepresentation is on the party alleging it, and a plaintiff is no more entitled to recover without sufficient averments in his bill, than he is without proof of his averments when properly made. The one is as essential as the other, and both must concur or relief cannot be granted. *Id.*
3. It is a settled principle of law and sound policy, that a party can not be permitted to disavow or avoid the operation of an agreement entered into with a full knowledge of the facts, on the ground of ignorance of the legal consequences which flow from these facts. *Id.* 470.
4. A conveyance from a child to its parent, whether with or without a valuable consideration, is presumed to be valid in the absence of any circumstances or proof tending to show fraud, misrepresentation or undue influence or reasonable grounds, from which the court may presume that the act was not entirely free and voluntary on the part of the child. *Id.*

DEEDS (*continued*).

5. A conveyance made by a woman immediately before her marriage is *prima facie* good, and can be impeached only by proof of fraud. *Id.*
6. Even where there is no absolute bar from the lapse of time or by the statute of limitations, it is a principle of courts of equity not to take cognizance of an equitable claim after a great lapse of time, and where from the death of parties and witnesses, there is danger of doing injustice, and there can no longer be a safe determination of the controversy. A court of equity therefore will not set aside a deed made by a daughter to her father immediately before her marriage conveying her remainder in land, in which the father had a life estate, upon the ground of undue influence after an interval of thirty-five years and after the death of the father, though the claim of the daughter is not barred by the statute of limitations, where the case is not a clear one, and there are no circumstances which sufficiently account for the delay. *Id.*
7. Lapse of time, when it does not operate as a positive statutory bar, operates in equity as an evidence of assent, acquiescence or waiver. *Id.*

See *Married Women*, 1-5; *Vendors and Vendees*, 1-5; *Mortgage*, 1-4.

DEED OF TRUST. See *Usury*, 2; *Chy. Pl. & Pr.*, 6, 7; *Mortgage*, 1, 4; *Trusts and Trustees*, 1.

DEFAULT.

A decree having been rendered in favor of the appellee upon a bill taken for confessed against the appellant, who never appeared in said cause, is a decree by default; and whatever errors there may be in said decree, could have been corrected by the court, which rendered the same, upon motion in the manner prescribed by the 5th section of chapter 134 of the Code of West Virginia; and no such motion having been made, as required by the 6th section of said chapter, an appeal and *superseedeas* allowed to such decree must be dismissed as improvidently awarded. *Forest v. Stephens*, 316.

DELINQUENT LANDS. See *Statute of Limitations*, 2.

DEMURRER.

1. A demurrer to a declaration containing several counts should be overruled, if any one count is good. *Sheppard v. Ins. Co.*, 368.
2. The common counts in an action of *assumpsit* are good on demurrer, when they are in the form prescribed by the English judges, set out in Conway Robinson's forms, pages 550, 551 and 554, though both the consideration and promises are stated after a

DEMURRER (*continued*).

whereas ; but this mode of statement is in apparent violation of the general rule of pleading, that whatever facts are necessary to constitute the cause of action, should be stated directly and positively. *Id.*

3. The failure to file a bill of particulars in such an action is not ground for a demurrer. *Id.*
4. A case in which a demurrer to the plaintiff's bill was erroneously sustained. *Wayt v. Carwithen*, 516.
5. Demurrer to a declaration, on the ground that it does not directly charge, that the plaintiff suffered damage, when such charge is made substantially and not by inference, is properly overruled. *Lane v. Black*, 617.
6. To justify the court in sustaining a demurrer to a bill for a specific performance filed by a vendor, the ground of the demurrer must be a short point, upon which it is clear, that the bill would be dismissed with costs at the hearing ; if the evidence to be taken might sustain the relief asked with some modification, the demurrer ought to be overruled, and the case stand to the hearing to be disposed of on its merits. *Tavenner v. Barrett*, 657.
7. It is not necessary, that the bill for a specific performance filed by a vendor should show, that he had a valid legal title to the land sold ; on the contrary the bill could not be demurred to though it appeared on the face of the bill, that he not only did not have a good legal title to the land, but that he had not any title legal or equitable to a portion of the land, and that he never could acquire a good title thereto, provided this portion was an insignificant part of the land sold, as the court would in such case decree specific performance with compensation. *Id.*
8. In such cases generally time is not regarded as of the essence of the contract, and the vendor's title may have been imperfect when he sold the land or when he brought the suit, it is sufficient if he can make it perfect before the report is made upon it during the progress of the suit, and time is frequently given him for that purpose ; hence he cannot be required to tender and file a good deed with his bill. *Id.*

See *Parties*, 6 ; *Banks and Bank Officers*, 2 ; *Statute of Limitations*, 4 ; *Pl. & Pr.*, 8. 9.

DESERTION.

1. Desertion is a breach of matrimonial duty, and is composed first, of the breaking off of the matrimonial cohabitation ; and second, an intent to desert in the mind of the offender. Both must combine to make the desertion complete. *Burk v. Burk*, 445.

DESERTION (*continued.*)

2. If a wife leaves her husband's home with the intention at the time of returning, and stays a considerable time from home, and her husband requests her return, which she refuses, from that time she deserts her husband. *Id.*
3. The intent to desert being once shown is presumed to continue, until the contrary appears. *Id.* 446.
4. If a husband, without an offer on the wife's part to return and live with him at his own residence, consent to take her to his own premises in a house near his residence, without a demand that she shall live in his house with him, and there visits her as her husband, the desertion is broken. *Id.*
5. If a husband changes his residence, his wife's residence is changed also, and if without a legal excuse she refuses to go with him, it is desertion on her part. *Id.*
6. Desertion to be ground of divorce from the bond of matrimony must continue three years. It must be a continuous, unbroken desertion. Two periods of desertion cannot be added together for the purpose of making up the term required by the statute. *Id.*
7. Desertion cannot be inferred from the mere fact, that the parties do not live together. *Id.*
8. Although the husband gives his wife only a meagre or no support, denies her much of his society, puts her in a house separate from his ordinary residence, because she refuses to live at his residence, and yet does not break off the matrimonial cohabitation, there can not be said to be any desertion by either. *Id.*
9. If during the three years required by the statute for a divorce from the bonds of matrimony, on the ground of desertion, the husband cohabits with his wife, the desertion is broken. *Id.*

DEVISAVIT VEL NON. See *Wills*, 2, 3, 4, 5.

DEVISORS AND DEVISEES. See *Wills*, 1-5. .

DILIGENCE. See *Bonds*, 2.

DIVORCE. See *Desertion*, 1-9.

DOWER. See *Widows*, 1.

DWELLING-HOUSES. See *Writ of Prohibition*, 5.

EJECTMENT. See *Pl. & Pr.*, 1, 2.

EMINENT DOMAIN.

1. Under our Constitution private property can not be taken with or without compensation for private use, *Varner v. Martin*, 534.

EMINENT DOMAIN (*continued*).

2. Under our Constitution private property can be taken only for *public use*, and then only upon just compensation being paid or secured to be paid. *Id.*
3. Whether private property should be taken for the direct and immediate use of the public is a question for the Legislature to determine, and when so taken and used, the title of the property condemned is not transferred to a private individual or corporation, but remains in the public directly. The courts can not sit in judgment upon the public exigencies, which demand this exercise of the right of eminent domain ; this being in such case solely a question for the Legislature. *Id.*
4. Hence a public highway under the direct control of the public, and kept in repair by it, and which no individual can obstruct without being liable to punishment, may if the Legislature by law so authorize, be established, though it leads only from a public road to the dwelling or farm of a single person. If the power conferred on a county court to open such public highway be general, no limitation of this power will be placed by the courts because of the degree of accommodation, which such public road may afford to the public at large. That is a matter in such case, which addresses itself not to the authority, but to the discretion of the county court. *Id.*
5. But if the title and control of the property to be condemned is to pass into the hands and under the control of a private person or corporation, so that they are to have it as their private property, whether the public is to have such a use of or in such property as will justify this exercise of the power of eminent domain, is a question for the courts to decide. Though if a particular use of it be declared by the Legislature to be a public use, the courts will hold such use to be public unless it manifestly appears, that it is not a public use. In such cases, what is a public use is a question for the courts to determine. *Id.* 535.
6. In such a case, where the title and control of the property to be condemned is in private hands or in a corporation, three qualifications are necessary to impose upon it such a public use as will justify the taking of such private property without the consent of the owner. *Id.*
7. The use, which the public is to have of such property, must be fixed and definite. The general public must have a right to a certain definite use of the private property on terms and for charges fixed by law ; and the owner of the property must be compelled by law to permit the general public to enjoy it. It will not suffice, that the general prosperity of the community is promoted by the taking of private property from the owner and transferring its title and control to another, or to a corporation to be used by

EMINENT DOMAIN (*continued*).

such other or by such corporation as its private property uncontrolled by law as to its use. Such supposed indirect advantage to the community is not in contemplation of law a public use. *Id.*

8. This use of the property, which in such case the public must have, must be a substantially beneficial use, which is obviously needful for the public to have, and which it could not do without except by suffering great loss or inconvenience. *Id.*
9. And when the title of property is thus transferred by condemnation to an individual or to a corporation, the necessity for such condemnation must be obvious. It must obviously appear from the location of the property proposed to be condemned, or from the character of the use, to which it is to be put, that the public could not without great difficulty obtain the use of this land or of other land, which would answer the same general purpose, unless it was condemned. And in such case, the courts will judge of the necessity for confirming such condemnation. *Id.*
10. A road must be deemed to be a private road, when its control is not under a public officer, and the public is not bound to work it or keep it in order, and where an individual might obstruct its use without being guilty of any public offense. *Id.*
11. The Legislature can not authorize the condemnation of land to establish such private road, even though the general public welfare of the community might be promoted by the forcible opening of such private roads. On the principles above laid down the public have no such direct and tangible use of such roads, as would justify the courts in regarding it as a public use, even though the public might have a right to use such private road, while it was permitted to be kept open, or while the person for whose use it was opened chose to keep it in repair. *Id.*
12. Section 44 of chapter 194 of the Acts of 1872-73, which is taken from sec. 38 of ch. 43 of the Code of West Virginia authorizes the condemnation of lands to establish such private roads, and it is therefore unconstitutional, null and void. *Id.* 536.

EQUITY OF REDEMPTION. See *Usury*, 2.

ERRORS. See *Chy. Pl. & Pr.*, 4.

EVIDENCE.

1. It is not an error for which a judgment will be reversed, to exclude evidence from the jury, unless such exclusion was to the prejudice of the exceptor. *Tompkins v. Kanawha Board*, 225.
2. There being conflicting evidence, held on well established principles, that the judgment will not be reversed, verdict set aside and new trial granted. *Id.*

EVIDENCE (*continued*).

3. A book of original entry, in which an entry is made in the usual course of business at the time of the transaction of matters within the personal knowledge of the book-keeper, may be used as evidence on the trial of a suit, if the book-keeper be dead at the time of the trial or a non-resident of the State, or if he be unable to be produced as a witness because of any other reason as for instance insanity. *Vinál v. Gilman*, 301.
4. But if the book-keeper be living and the court is able to enforce his attendance, the book cannot be used as evidence, unless his testimony as a witness also accompanies its production. *Id.*
5. Such book is received as evidence not only from the necessity of the case, but also because it is a part of the *res gestae* and general convenience compels its admittance, and hence it should be admitted without the book-keeper being examined as a witness, whenever the court can not compel this attendance, as when he is a non-resident. *Id.*
6. If the book itself be in the possession of a person, who is a non-resident of the State, so that its production can not be compelled by the court, a copy of any such entry in it as answers the above description may be used as secondary evidence when it is proven, that it has been examined by a witness and compared with the original entry, and proven to be an exact copy. *Id.*
7. Such an entry in such a book stands on essentially distinct ground from a mere private entry of a person ; such private entry *itself* never being evidence, though it may be used by a witness to refresh his memory. *Id.* 302.

See *Vendors and Vendees*, 4, 20, 21 ; *Deeds*, 1 ; *Pl. & Pr.*, 8 ; *Jury* ; *Appellate Court*, 6, 7, 8 ; *Wills*, 5 ; *New Trials*, 1 ; *Corporations*, 1 ; *Abandonment*, 3, 4.

EXECUTORS. See *Wills*, 8, 10.

FAILURE OF CONSIDERTION. See *Pl. & Pr.*, 15.

FELONY. See *Criminal Pleading and Practice*.

FEMME SOLE. See *Deeds*, 5.

FOREIGN COURTS. See *Chy. Pl. & Pr.*, 12.

FORFEITED LANDS. See *Statute of Limitations*, 2.

FRAUD. See *Vendors and Vendees*, 2, 3 ; *Deeds*, 2 ; *Principal and Agent*, 1, 2 ; *Pl. & Pr.*, 15.

GRANTS OF LAND. See *Land Grants*, 1, 2.

HIGHWAYS. See *Eminent Domain*.

HOMESTEAD. See *Widows*, 2.

HUSBAND AND WIFE. See *Married Women*, 1-10, 13; *Vendors and Vendees*, 21; *Acknowledgment of Deeds*, 1.

IGNORANCE. See *Deeds*, 3.

INADEQUACY OF PRICE. See *Chy. Pl. & Pr.*, 9.

INDEBITATUS ASSUMPSIT. See *Pl. & Pr.*, 7.

INDICTMENT. See *Criminal Pleading and Practice*, 1-5.

INJUNCTION.

A judge in vacation may dissolve an injunction, though some formal parties defendants have not answered the bill, when an answer has been filed by the substantial defendants in the bill, which denies all the material allegations of the bill and no proof has been taken to sustain the bill. *Livesay v. Feamster*, 83.

See *Chy. Pl. & Pr.*, 6, 7.

INSANITY. See *Evidence*, 3.

INSTRUCTIONS.

1. If an instruction given by a court on an abstract question is erroneous, the Appellate Court will not reverse the judgment of the court below on that account, if it appears that no injury could have resulted to the plaintiff in error from such erroneous instruction; but if such erroneous instruction was calculated to mislead the jury to the injury of the plaintiff in error, the Appellate Court will reverse the judgment, and award a new trial on that account. *Sheppard v. Ins. Co.*, 370.

2. A court ought not to grant an instruction irrelevant to the case, though as a proposition of law it may be in the abstract right. *State v. Thompson*, 742.

See *Jury*; *Pl. & Pr.*, 6.

INSURANCE.

1. A policy of insurance against fire is a contract of indemnity; and the assured must have an insurable interest in the property, when it is insured, and when the loss by fire occurs. *Sheppard v. Ins. Co.*, 368.

2. But if the policy on its face sets out such an insurable interest, as for example ownership of the property insured, this alone establishes, that the assured has *prima facie* an insurable interest; and if this be disputed, the insurance company must by proper proof show, that he had not an insurable interest. *Id.*

3. If a party has the care and custody of property, he may insure it in his own name, even though he be not responsible for its

INSURANCE (*continued*).

- safety, if he really insured it for the owner, though this be not expressed on the face of the policy, for in such case, he has an insurable interest; and in general to give a party an insurable interest in property it is not necessary, that he should have any actual right of property either legal or equitable in the subject insured, but it is sufficient, if he or those whom he represents will suffer any sort of loss by its destruction. *Id.*
4. If the personal estate of a decedent be insufficient to pay all his debts, the administrator of such decedent has an insurable interest in the buildings, which belonged to his decedent; for our statute in such case, authorizes him as administrator to bring a suit in chancery to have such buildings sold to pay the debts of the decedent. *Id.*
 5. *Quære*: Would an administrator have such an insurable interest, if the personal estate was sufficient to pay all the decedent's debts? *Id.*
 6. If the administrator of a decedent has such insurable interest, he has a right to recover on the policy in case of loss by fire, though when the loss occurs there are abundant real assets to pay all the decedent's debts, if they have not been actually paid. *Id.*
 7. An insurance company, which establishes a local agency, is responsible for all the acts and declarations of its agent within the scope of his apparent authority. The question in such cases is not what authority he in fact has, but what were his apparent powers, that is, what powers had the assured a right to believe were given to the agent. *Id.*
 8. A policy of insurance may be continued in force by a subsequent contract made before, at the time of, or after the policy had expired. *Id.*
 9. Such a continuance of a policy differs from a new contract of insurance, as by it the original contract is kept up; and in case of loss the original policy is the basis of action in connection with the contract of renewal or continuance; and if changes are intended to be made, it is properly done by simply expressing the changes in the renewal or continuance-receipt. *Id.*
 10. If such receipt be ambiguous on its face, it may be explained by the situation of the parties or by the surrounding circumstances existing when it was executed, but not by verbal declaration of the parties. *Id.*
 11. A denial by an insurance company of its liability on other grounds, before any preliminary proofs are made, and before the time within which such proofs are to be made by the terms of the policy, is in law a waiver of the conditions of a policy requiring such proofs. *Id.*

INSURANCE (*continued*).

12. Where a declaration in an action on a policy of insurance is filed in the form prescribed by chapter 68 of Acts of 1877, section 1, and the defendant under the fourth section of this act pleads, that he is not liable to the plaintiff as is in said declaration alleged, but the real defense is, that the action cannot be maintained because of the failure to perform or comply with, or the violation of any clause, condition or warranty in, upon or annexed to the policy, or continued in or upon any paper, which is made by reference a part of the policy; and by this fourth section the defendant is required to file a statement, in writing, specifying by reference thereto or otherwise, the particular clause, condition or warranty, in respect to which such failure or violation is claimed to have occurred, with such affidavit thereto as is required by this section, and he accordingly offers to file such plea and statement, the court must permit such plea and statement with accompanying affidavit to be filed, and cannot refuse to permit such statement or any part thereof to be filed, either because in the opinion of the court certain facts set out in said statement constitute no defense to the plaintiff's action, or because the statement is so vague as not to notify the plaintiff in effect of the nature of the defense intended to be set up against him. *Cappellar v. Ins. Co.*, 576.
13. If any of the facts set out in such statement constitute no defense to the action, the court on the motion of the plaintiff on the trial of the case, should exclude from the jury all evidence offered by the defendant to prove such immaterial facts. *Id.*
14. If any of the facts set out in such statement are set out so vaguely, as not to notify the plaintiff in effect of the nature of the defense intended to be set up against him, the court at the trial of the case before the jury should on motion of the plaintiff exclude all the evidence of the defendant offered to prove facts so insufficiently stated in his written statement and filed with his plea. *Id.*
15. If however the defendant under the third section of said act is required by the court or judge to file a more particular statement, in any respect, of the nature of his defenses, or of the facts expected to be proven at the trial, which must have the affidavit prescribed by this section attached to it, and such statement and affidavit are filed, the court may adjudge this statement filed under its order insufficient, if it be too vague to notify the plaintiff in effect of the nature of the defense intended to be set up against him; but not because the facts stated constitute in the judgment of the court no defense. And if the statement be regarded by the court as insufficient because of such vagueness, the court may have its judgment, that it is thus insufficient, entered of record, and, as justice may require, grant further time for filing the same, or permit the statement filed

INSURANCE (*continued*).

to be amended, or it may at the trial exclude evidence offered by the defendant if in default as to any matter, which he has so failed to state or has thus insufficiently stated, whether it has been so entered of record, or whether no entry of record has been made as to the sufficiency or insufficiency of such statement; or it can exclude evidence of any fact though set out definitely in such statement, if such fact constitutes in the judgment of the court at the trial no defense. But it cannot refuse to permit such statement to be filed when it is offered by the defendant. *Id.*

16. Precisely the same rules are applicable when statements are filed under the provisions of chapter 66 of Acts of 1877 by the plaintiffs. *Id.* 577.
17. If the facts on either side have been proven before the jury, the court at the trial may instruct the jury, that such facts constitute no defense for the defendant and no ground of claim by the plaintiff. *Id.*
18. Under chapter 66 of Acts of 1877 these statements, whether filed by the plaintiff or by the defendant, are not in the nature of pleadings, but are in the nature of notices to the adverse party of the nature of the claim or defense intended to be set up against him. They resemble closely the bill of particulars, which under the provisions of the Code of West Virginia are required to be filed in actions of *assumpsit* with the declaration or with the pleas of payment or set-off, or the bill of particulars, which under the Code of West Virginia the court may require to be filed in any sort of action. *Id.*

See *Negligence*, 2; *Partners and Partnership*, 5.

INTEREST.

In a suit to subject real estate, conveyed by a debtor in his lifetime without valuable consideration, to the payment of a simple contract debt, it is error for the court to take the amount of a judgment for such debt recovered against the administrator of such debtor as the foundation for its decree and to give interest on the amount of such judgment—said amount being for the principal and interest on the original debt at the date of said judgment. The decree in such case should be for the original debt with the interest aggregated thereon to the date of the decree, and then interest on such aggregate until paid. *Bank v. Good*, 455.

See *Partial Payment*, 1.

INTERLINEATIONS AND ERASURES. See *Record*, 1, 6; *Cr. Pl. & Pr.*, 8, 9.

ISSUE. See *Pl. & Pr.*, 1.

JUDGMENT. See *Pl. & Pr.*, 1; *Appellate Court*, 7, 8, 10.

JUDGMENT-CREDITORS. See *Parties*, 2.

JUDGMENT-LIEN. See *Parties*, 2.

JUDICIAL SALES. See *Parties*, 3; *Chy. Pl. & Pr.*, 6, 7.

JURISDICTION. See *Writ of Prohibition*, 2, 3, 5; *Bonds*, 1, 2, 3.

JURORS. See *New Trial*, 2.

JURY.

The courts of this State are peculiarly jealous of any encroachment by the court on the province of the jury, and it is error for a court in the trial of a case, to intimate any opinion in reference to matters of fact, which might in any degree influence the verdict nor can the court instruct the jury as to the weight to be given by them to the evidence of any witness, whether the witness be impeached or not, or whether he is contradicted as to material facts or not. The jury are the exclusive judges of the weight to be attached to the evidence of any witness, and the court would err in influencing them in any way in determining this weight, either by instruction as to the proper manner of ascertaining such weight, or otherwise. *State v. Thompson*, 741.

KANAWHA BOARD. See *Negligence*, 1, 2.

LAND-GRANTS.

1. Under the act of June 1788, authorizing the Governor to issue grants with reservations of prior claims included within the boundaries thereof, the reservations in such grants, under said act, exclude from their operation all lands held by prior claimants at the dates of the surveys on which such grants are founded, within the exterior boundaries of the grants, whether the title was only inchoate or had been perfected by grants. *Bryan v. Willard*, 65.
2. Under an inclusive grant, issued by virtue of said act, containing a general reservation of a specified quantity of land for prior claimants, the grantee acquires no title whatever to the land so reserved. And in such case, if the title of any such prior claimant becomes forfeited for non-entry or for the non-payment of taxes, the title thus forfeited will not vest in such inclusive grantee under the act of March 22, 1842. *Id.*

LIS PENDENS. See *Chy. Pl. & Pr.*, 12.

LOST BONDS. See *Bonds*, 1, 2, 3.

MARRIED WOMEN.

1. If the certificate of the acknowledgment of a deed by a married woman living with her husband shows, that she and her husband jointly acknowledged the deed before a proper officer, such deed is inoperative to convey her interest, though the certificate shows, that she was after such acknowledgment examined privily and apart from her husband by the officer and had the deed fully explained to her and declared, that she had willingly executed the same and did not wish to retract it. *McMullen v. Eagan*, 233.
2. If such deed be recorded, and afterwards the officer re-writes his certificate and signs the same dating it as of the time of the first acknowledgment, and such second certificate states, that she appeared before the officer, and being examined by him privily and apart from her husband and having the deed fully explained to her she acknowledged the same to be her act and declared, that she had willingly executed the same and did not wish to retract it, though such second certificate is in due form, yet the deed will still be inoperative to convey her interest in the land, as the officer has no authority to correct his first certificate, though it was not written in such way as showed the real facts. *Id.* 234.
3. But if she and her husband afterwards go before the clerk of the county clerk in his office and acknowledge this deed in the manner prescribed by the statute, such acknowledgment, if endorsed on the deed and duly recorded by the clerk, which it is his duty to do, will cure such defect in the first acknowledgment and render the deed operative to convey her interest in the land. *Id.*
4. A married woman living with her husband can convey under our statute-law her separate real estate by joining with her husband and by having the deed acknowledged after privy examination of her in precisely the same manner, as she always could convey her real estate, which was not her separate property; and she can convey such real estate in no other manner. *Id.*
5. A married woman living with her husband can under our statute convey her separate real estate by joining with her husband and after a privy examination of her in precisely the same manner, as is required in order to relinquish her interest in real estate not her separate property; and she can convey her separate real estate in no other manner. *Watson v. Michael*, 568.
6. Unless the certificate of the privy examination of the wife shows, that all the requirements of the statute have been substantially complied with, the deed is void as to her. *Id.*
7. The words "and the deed being read to her" are not substantially the same as the words "being fully explained to her." *Id.*

MARRIED WOMEN (*continued*).

8. Unless the certificate of acknowledgment shows, that "the deed was fully explained to her," it is fatally defective. *Id.*
9. The certificate of a privy examination must show, that *during* such examination the writing "was fully explained to her;" and if such certificate shows, that such explanation was *before* the privy examination, it is fatally defective. *Id.* 569.
10. When the husband unites in the deed, though it may be void as to the wife for a fatal defect in the certificate, yet the grantee may elect to take the husband's interest in the land in full satisfaction of the contract, unless it can be shown that for some cause the deed is also void as to the husband. *Id.*
11. A certificate of a privy examination, which fails to show, that the married woman had the deed fully explained to her is fatally defective, and the deed void as to her. *Tavener v. Barrett*, 658.
12. Common law judgments or judgments of justices of the peace against a married woman on her contracts made during coverture, and judgments rendered by courts having no jurisdiction in such cases, are nullities creating no lien on her separate real estate. *Id.*
13. The statutes of this State—chap. 66 of the Code—authorize a married woman, living with her husband, to maintain an action at law for the recovery of the possession of her separate real property without uniting her husband in the action. *Mathews v. Greer*, 694.

See *Trusts and Trustees*, 1.

MEASURE OF COMPENSATION. See *Vendors and Vendees*, 19.

MEASURE OF DAMAGES. See *Negligence*, 6.

MISCONDUCT OF JUROR. See *New Trial*, 2.

MISTAKES. See *Chy. Pl. & Pr.*, 10.

MORTGAGE.

1. If the whole transaction between the grantor and the grantee in a deed absolute on its face shows, that after the execution of such deed a debt still remained due from the grantor to the grantee, such transaction will be regarded as a mortgage, it matters not in what form the papers are drawn. *Hoffman v. Ryan*, 415.
2. Though the deed be absolute on its face, and a contract is made at the same time in writing between the grantor and the grantee, whereby the grantee is authorized to sell the land or a part of it in a specified time, and to pay back the consideration for the deed, yet in the absence of parol proof to the contrary such deed will be regarded as a mortgage. *Id.*

MORTGAGE (*continued*)

3. The fact, that possession remains with the grantor, will have great weight in favor of holding the transaction to be a mortgage, when the question is, whether it be a conditional sale or a mortgage. *Id.*
4. If the owner of a tract of land executes a deed of trust, conveying his land to a trustee to secure certain debts, and afterwards a judgment is rendered against him, which is duly docketed, and he then makes a contract with a third party to advance for him the amount secured by the deed of trust, and to secure such advance mortgages this land to the person advancing the money for him, and such mortgagee pays off the debts secured by the deed of trust, it would be a complete satisfaction of these debts both in law and equity; the deed of trust becomes wholly inoperative, and the mortgagee can not be subrogated to the rights of the *cestui que trust* and have the deed of trust kept alive for his benefit, thus securing priority over the judgment-debtor. *Id.*
5. Any deed or written contract used by the parties for the purpose of pledging real property, or some interest therein, as security for a debt or obligation, which is informal and insufficient as a common law mortgage, but which by its terms shows that the parties intended that it should operate as a lien or charge upon specific property will constitute an equitable mortgage and may be enforced in a court of equity. *Wayt v. Carwithen*, 516.
6. The right to enforce the lien of an equitable mortgage is not lost by the lapse of time, or barred by the statute of limitations, until such time has elapsed as would bar relief upon the instrument creating such lien—the dignity and character of the lien depending upon the nature of the instrument creating it, and not upon the antecedent debt or lien intended to be revived or preserved. *Id.*

NEGLIGENCE.

1. The Kanawha Board being authorized by law to charge tolls on the Kanawha river is bound to keep the river in navigable condition and is liable for damages sustained by reason of its negligence in failing so to do. *Tompkins v. Kanawha Board*, 224.
2. The Kanawha Board is not an insurer of the goods shipped on said river and is only liable for losses, which may occur by reason of its negligence in failing to keep the river in navigable condition. *Id.*
3. Remote negligence of the plaintiff will not prevent his recovery for an injury immediately caused by the negligence of the defendant. The negligence of the plaintiff, which defeats his recovery, must be a proximate cause of the injury. *Id.*

NEGLIGENCE (*continued*)

4. The question of negligence is for the jury upon all the evidence before them and upon the duties imposed by law upon the defendant; and any want of proper diligence in performing such duties is negligence. *Id.*
5. Where the law imposed upon a company, authorized to collect tolls upon a river, the duty of keeping the chutes free from obstructions, proof that a log was in a chute in such river, on which the loss occurred, *prima facie* shows negligence in the defendant-company and casts the burden on it to show, that it used due diligence to discover and remove such obstruction. *Id.*
6. The general rule is, that where personal property is being shipped to a certain place for sale, and a loss occurs, the measure of damages is the difference between the price, at which the property was bought, and its market value at the place where, and at the time, when it should have been delivered. But where the owner and shipper of the property had contracted to sell it in the place where it was to be delivered, the price, which was agreed to be given for it, is the best evidence of its value; and the measure of damages in that case is the difference between the cost of the property and such price. *Id.* 225.

NEW TRIAL.

1. A new trial ought not to be granted for evidence discovered after the verdict is rendered, if this evidence be merely cumulative or such as ought not to affect the result; or if it appeared, that due diligence to discover the evidence was not used before the trial. *Dower v. Church*, 24.
2. A jurymen heard, under circumstances unfavorable to his understanding clearly, a casual conversation between a witness in the case and a stranger, neither of whom knew he was a juror, in which comments were made on another witness and on the evidence. The juror remarked to one of them, that the witness criticised wanted to come back and explain his evidence, but was not allowed to do so, and that two other witnesses had contradicted him. He also said, he thought he knew how the jury stood. The stranger then asked some question, and he the juror then informed him he was one of the jury. The counsel of the party against whom the verdict was afterwards rendered, before the case was submitted to the jury, was informed by this stranger of this occurrence, but he could not tell the name of the juror. The attention of the court was not called to the matter till after the rendition of the verdict. **HELD:**

That the circuit court did not err in refusing, under these circumstances, to grant a new trial on account of the misconduct of this juror. *Id.*

NEW TRIAL (*continued*)

3. Where the court which tried the cause, certified all the *facts proved*, on the trial, and from the facts so certified, it clearly appears that they were wholly insufficient to sustain the verdict of the jury, this Court will not hesitate to set the same aside, and in a proper case, award the defendant a new trial. *State v. Foster*, 767.

See *Pl. & Pr.*, 10, 16, 22; *Evidence*, 2.

NIL DEBET. See *Pl. & Pr.*, 7.

NON EST FACTUM. See *Pl. & Pr.*, 7.

NON-RESIDENTS. See *Chy. Pl. & Pr.*, 11.

NOTARY PUBLIC. See *Acknowledgment of Deeds*, 1.

NOTICE.

1. Opinion of Green, Judge, as to the parties, on whom it is necessary for a commissioner in chancery to serve a notice, and as to the measure of accuracy required in order to make such notice sufficient, if objected to in the court below. *Livesay v. Feamster*, 83.
2. Opinion of Green, Judge, as to when a person, who had not been served with notice in the court below, would be permitted to appear in the Appellate Court and waive errors and ask, so far as he was concerned, an affirmation of a decree in the court below. *Id.*

OFFICE-JUDGMENT See *Pl. & Pr.*, 5.

PAROL AGREEMENT. See *Deeds*, 1.

PARTIAL PAYMENTS.

The proper rule for computing interest where partial payments have been made, is to deduct the payment from the aggregate sum of principal and interest, computing the latter to the date of the payment, and the balance forms a new capital on which interest is to be computed to the next payment, but the new capital must in no instance be more than the former, so that if the payment be less than the interest due the excess of interest must not augment the remaining capital, because that would give interest upon interest which would be unlawful. *Ward v. Ward*, 263.

See *Pl. & Pr.*, 8.

PARTIES.

1. A case in which the decree of the circuit court is reversed for want of proper parties to the suit, and because the rights and liabilities of the parties were not properly ascertained and adjusted in the suit or by said decree. *Hoge v. Vintroux*, 2.

PARTIES (*continued*).

2. In a suit brought by a judgment-creditor to enforce his judgment-lien, he should make formal defendants to the suit all creditors, who have obtained judgments against the debtor in the courts of record in the county wherein the lands lie, which he seeks to subject, and if he fails to do so, he should in the order of reference in the cause provide for calling in all judgment-creditors of the debtor by publication ; and if this be not done, this Court in such a case will reverse an order of the court confirming the commissioner's report and ordering a sale of the debtor's lands. *Livesay v. Feamster*, 83.
3. When it is uncertain whether or not certain persons have an interest in land, it is error to decree a sale of such land without making such persons parties to the suit. *Donahue v. Fackler*, 124.
4. An agent for the purchase or sale of an estate, though he transact the business in his own name, is generally not a proper party to a suit brought for the specific execution of the contract of sale or purchase. But if he be an agent to sell, and makes the sale, and takes of the purchaser bonds for the purchase-money payable to himself, and these bonds are secured by a deed of trust executed by the purchaser conveying other lands of his to secure such bonds, then in a suit brought by the vendor to enforce specifically such contract, and to enforce the collection of such purchase-money bond, such agent must be made a party either plaintiff or defendant, for in such case he is not simply an agent, but he is a trustee holding the legal title to such bonds for the use of the real vendor of said land. *Tavener v. Barrett*, 656.
5. In such case such agent or trustee may be made a co-plaintiff with the vendor, or he may be made a defendant with the vendee, the vendor being made the sole plaintiff. *Id.* 657.
6. If however the fact was, that such agent was not a trustee, but a mere agent, and could not properly be made a party to a suit for specific performance, but was improperly made a co-plaintiff with the vendor, the objection to such impropriety of proceeding would be properly made by a demurrer to the whole bill. *Id.*

See *Commissioners*, 4 ; *Pl. & Pr.*, 1, 2, 3 ; *Wills*, 2, 3, 4 ; *Chy. Pl. & Pr.*, 2, 8.

PARTNERS AND PARTNERSHIP.

1. The assignment by one partner of all his interest in the partnership and its property to trustees for the payment of debts operates, *ipso facto*, as a dissolution of partnership. *Conrad v. Burk et al.*, 396.

PARTNERS AND PARTNERSHIP (*continued*).

2. The dissolution of partnership revokes the authority of one partner to bind the partnership in reference to any new contract except in settling and paying the debts of the concern. And the agreement of the partners that one of their number shall wind up the business, does not enlarge his powers so as to enable him to impose any new liability upon the firm, or create a cause of action against the other partners. *Id.*
3. A party, who as trustee, has an interest with others in the property of a dissolved partnership, in order to prevent suits against such property, pays off a note against said partnership which he as trustee was under no obligation to pay, using his own funds for such payment. **HELD :**
 - I. Such payment is regarded in law as having been made by a stranger to the transaction, and does not make said party the assignee of such note or substitute him to the rights of the original holder or payee of said note.
 - II. But, having paid said note at the request of the managing partner, the party so paying it will be treated as a simple contract creditor of said firm on an implied promise to pay him the amount he paid for the use of said firm. *Id.*
4. In a suit in equity brought for the settlement of an insolvent partnership, the assets of which are insufficient to pay the debts, and the contest in the suit is wholly between the creditors, the partners being non-residents and not appearing in the suit, one creditor should be permitted to avail himself of the bar of the statute of limitations against the claims of other creditors in any proper manner; for instance, by exceptions to the report of a commissioner made in the cause. *Id.* 397.
5. The managing partner of a dissolved partnership has authority to insure the firm property if done in good faith, and having such authority he may charge the firm assets to refund premiums paid for such insurance by a third party at his request. The premiums so paid are part of the expenses incurred in managing the property and as such entitled to be paid as preferred claims against the firm assets, and are not affected by the statute of limitations until a settlement of the partnership accounts has been made. *Id.*

PAYMENT.

An administrator as such, being indebted to an insane distributee, offers to give to the committee of such distributee his bond for such indebtedness, and the committee accepts such offer and the administrator executes to the committee his bond and the latter gives him a receipt, reciting therein that *the note* of the administrator has been received for the amount of such indebtedness and the administrator, in a subsequent, *ex parte*, settlement

PAYMENT (*continued*).

of his administration accounts, is credited with the said amount, but said bond is never paid and the administrator, having died and his estate found to be insolvent, such bond will not be held to be a payment of said indebtedness and the sureties on the administration bond will be made liable therefor to the representatives of such distributee. *Hoge v. Vintrour*, 2.

See *Prom. Notes and Bills of Ex.*, 1.

PERSONAL DECREES. See *Pt. & Pr.*, 3.

PERSONAL REPRESENTATIVES.

1. Section 7 of chapter 86 of the Code, confers upon the personal representative of a decedent the right to bring a suit in equity, as in said section provided, either before or after the expiration of six months from his qualification; but he cannot bring such suit *after* six months, if any creditor has, before such representative commences his suit, filed a creditor's bill as provided for in said section. *Reinhardt v. Reinhardt*, 76.
2. A judgment against the personal representative of an estate is not even *prima facie* much less conclusive evidence against the devisee or heir of such estate; and the fact that the same person may be both personal representative and heir or devisee does not constitute an exception to the rule. *Bank v. Good*, 455.

PLEADING AND PRACTICE.

1. As in ejectment the action prior to the act of 1877 could be brought only against the party in possession, when the premises were occupied, one, who is interested in the subject of the action though not a party to the record, and who employs counsel and defends the action, after verdict with judgment for plaintiff, and execution for costs unsatisfied, may be required to pay the costs of plaintiff in such action. *Johnston v. Manns*, 16.
2. A landlord, who is entitled to be substituted in the place of or joined with the defendant in ejectment, and without causing himself to be made a party defends such action unsuccessfully in the name of the original defendant, will be ordered to pay the costs of the plaintiff, after execution against the defendant on the record has been returned unsatisfied. *Id.* 17.
3. The appropriate mode of requiring such person to pay such costs, is by rule, requiring him to show cause why he should not be compelled to pay the same. *Id.* 17.
4. If a circuit court enter up a judgment on the verdict of a jury, sworn to try the issue joined, in any case criminal or civil, including an action of ejectment where no issue has been joined, or no plea filed by the defendant, such judgment will for such

PLEADING AND PRACTICE (*continued*).

- reason only be reversed by the Appellate Court. *Ruffner v. Hill*, 152.
5. If a defendant desires to avail himself of the provision of the statute—section 21 of chapter 125 of the Code—which permits a plea in abatement and in bar at the same time, he must file his pleas at rules before his right to plead in abatement is lost, and he cannot plead in abatement, under said statute or the general law, after he has pleaded in bar or after the office judgment has been confirmed. *Delaplain v. Armstrong*, 211.
 6. Although an instruction propounds the law correctly, and the court modifies it, the judgment will not be reversed for that reason, unless the modification was to the prejudice of the exceptor. *Tompkins v. Kanawha Board*, 224.
 7. A plea of *nil debet* in an action of *indebitatus assumpsit* is cured by a verdict and will be treated in the Appellate Court, as if it had been a plea of *non assumpsit*. *Smith v. Townsend*, 486.
 8. If no account of payments is filed with a plea of payment, under § 4 ch. 126 of Code of W. Va. no proof can be given by the defendant of any partial payments; but if without objection on the part of the plaintiff the defendant does prove such partial payments, the jury may properly consider such proof and base their verdict upon it. *Id.*
 9. A simple statement of the facts in a case, though signed by the judge, is no part of the record, if not made so by an entry on the record-book or by its being incorporated in and in some manner made part of a bill of exceptions, which is made a part of the record by an entry on the record-book. *Id.*
 10. An appellate court can not set aside a verdict and award a new trial, which the court below refused, if there be in the case sufficient evidence to justify the verdict after rejecting all parol evidence in conflict with such evidence, and which was offered by the party, against whom the verdict was rendered. *Id.*
 11. Where in an action of covenant for breach of warranty of title the declaration sets out the making of the deed and the general warranty of title therein contained, and no plea of *non est factum* is pleaded, but the only pleas pleaded on "covenants performed" and covenants not broken, the making of the deed and the warranty are admitted by the pleadings, and no proof thereof is necessary. *Riddle v. Core*, 530.
 12. On a demurrer to evidence the only question for the consideration of the court is, whether the evidence supports the issue. *Id.*

PLEADING AND PRACTICE (*continued*).

13. After joinder in the demurrer the general practice is for the jury to assess conditional damage. *Id.*
14. A new trial, in such a case, because the verdict is excessive, can as in other cases only be had upon *motion*, as the court is not bound *ex mero motu* to grant a new trial. The Appellate Court cannot grant a new trial without such motion in the inferior court. *Id.*
15. Under the provisions of section 5 of chapter 126 of the Code of this State, in any action on a contract, whether the *contract be by deed* or by parol, the defendant may file a plea alleging any such failure in the consideration of such contract, or fraud in its procurement, as would entitle him either to recover damages at law from the plaintiff, or to relief in equity, in whole or in part; and if such plea is sufficient in form he is entitled to prove facts showing such failure in the consideration in whole or in part. *Fisher v. Burdett*, 626.
16. The verdict of a jury, which necessarily disposes of all the issues in the case, is sufficient, although it may not respond separately to each several issue or fact presented by the pleadings. *Black v. Thomas*, 709.
17. In an action of *assumpsit* the defendant pleads payment and files with his plea specifications of sets-off exceeding in amount the demand of the plaintiff, and the jury by its verdict finds for the defendant simply a gross sum. **Held:**

That under section 9 of chapter 126 of the Code such verdict must be interpreted as a finding that the sets-off of the defendant exceeded the amount to which the plaintiff was entitled by the sum so found, and the verdict is not, therefore, ambiguous or uncertain. *Id.*
18. Where the evidence and not the facts is certified in the bill of exceptions the appellate court will not reverse the judgment unless, after rejecting all the conflicting parol evidence of the exceptor and giving full faith and credit to that of the adverse party, the decision of the trial court still appears to be wrong. *Id.*
19. Where the matters certified in form as facts are in any respect conflicting, such certificate must be treated as containing the evidence and not the facts. *Id.*
20. If the verdict can not be sustained according to the foregoing rules, it is as much the duty of the trial-court to set the same aside in such case as it is its duty to sustain the verdict when it does not contravene said rules; and while the appellate court ought not to set aside the verdict with the same facility as the

PLEADING AND PRACTICE (*continued*).

trial-court, because in such court the weight which must always be given to the verdict of a jury fairly rendered is supplemented by that of the opinion of the judge who presided at the trial which is entitled to peculiar respect upon the question of a new trial upon the ground that the verdict is contrary to the evidence, still the action of the trial-court in such cases may be reviewed by the appellate court and in a clear and plain case it is the duty of that court to set aside the verdict and order a new trial. *Id.*

21. Other rules and principles stated which should govern courts in denying or granting motions to set aside the verdict of a jury upon the ground that it is not warranted by the evidence. *Id.*
22. A case in which the appellate court set aside a verdict and ordered a new trial upon the ground that the verdict was clearly and plainly unsupported by the evidence. *Id.* 710.

See *Change of Venue*, 1, 2; *Evidence*, 1-7; *Demurrer*, 1-3, 5; *Insurance*, 1-18; *Unlawful Entry and Detainer*, 1-3.

PLEA IN ABATEMENT. See *Pl. & Pr.*, 5.

PLEA IN BAR. See *Pl. & Pr.*, 5.

PRESUMPTION OF LAW. See *Corporations*, 1.

PRINCIPAL AND AGENT.

1. Where an agent buys a claim for his principal, and in order to induce the seller to part with it makes false and fraudulent misrepresentations in reference thereto, and the principal accepts the purchase and takes the benefit thereof, he cannot while claiming the benefit of the purchase and retaining the claim repudiate said representations of his agent, on the ground that they were not authorize by him and were not within the scope of his authority. *Lane v. Black*, 617.
2. Where an attorney or agent undertakes the collection of a claim for his client or principal and, while such relation exists, buys the claim from his principal, whether false representations were made or not to induce the principal to sell his claim, or even if the claim was sold for an adequate price, the sale is voidable at the option of the principal. *Id.*

See *Parties*, 4, 5, 6.

PRINCIPAL AND SURETY.

1. In a suit on the bond of an administrator against the principal and sureties therein, the bar of the statute of limitations, as to such sureties, is ten years from the return day of an execution issued on the plaintiff's claim; or ten years from the time the

PRINCIPAL AND SURETY (*continued*)

administrator shall have been ordered by a court acting upon his account, to pay such claim.

2. If a surety extinguishes the debt of his principal, in whole or in part, for any sum less than the full amount so extinguished, he can in the absence of an express contract recover from his principal only the amount actually paid by him. *Matthews v. Hall*, 510.
3. The implied contract in such case is, that the surety shall be indemnified only, and he will not be allowed to speculate out of his principal; consequently, if a surety obtains a credit on the debt of his principal without pecuniary cost, loss or damage to himself, he will not be entitled to recover anything for procuring such credit, although his principal avails himself of the benefit of such credit and the same is allowed to him by the creditor. *Id.*

See *Bonds*, 4, 5, 6, 7.

PROHIBITION. See *Writ of Prohibition*, 1, 2, 3, 4, 5.

PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. Where a non-negotiable note or bond is given by a debtor to his creditor for an existing debt, such bond or note is *prima facie* not a conditional payment but collateral security for such debt; but it may be shown, by either direct or circumstantial evidence to have been intended by the parties to be an absolute or conditional payment. If such bond or note was received as collateral security, though it be made payable at a future time, unless there was an agreement to postpone the right of action on the original debt proven by other evidence direct or circumstantial, the taking of such collateral security does not suspend the right of action on the original debt, and therefore does not release the sureties from their liability. *Sayre v. King*, 17 W. Va. 562. *Hoge v. Vintrour*, 1.
2. The giving of a new note for an old one which had become due—the amount and makers of the two notes being the same—will not be treated as a payment or extinguishment of the old note or the pre-existing debt, unless the parties so *expressly agree*; but it will be regarded merely as an extension of credit. *Bank v. Good*, 455.
3. In such case the surrender of the old note will not of itself raise a presumption of such agreement to extinguish the old note by the giving of the new one, it being considered as a conditional surrender and that its obligation is restored and revived, if the new note is not paid. *Id.*

PROMISSORY NOTES AND BILLS OF EXCHANGE (*cont'd*).

4. And the new note will not be regarded as a payment of the old, even when it is so expressly agreed, if such agreement was procured by the concealment of any material fact affecting the security of the debt. *Id.*
5. Nor will the presumption apply where the creditor, when he takes the new note, abandons some security which he holds. *Id.*
See *Payment; Partners and Partnership*, 3.

PURCHASE-MONEY. See *Commissioners*, 1; *Chy. Pl. & Pr.* 2, 3, 6, 7; *Wills*, 9.

REASONABLE DILIGENCE. See *Chy. Pl. & Pr.*, 1.

RECORD.

1. A record imports such absolute verity, that no person against whom it is pronounced will be permitted to aver or prove anything against it. *State v. Vest*, 796.
2. The record to which such absolute verity is imputed consists not only of what is written on the record-book and authenticated by the signature of the judge, but it also consists of all indictments, pleadings and papers referred to by the record-book and thereby made a part of the record. *Id.*
3. But if a record is interlined or erased in a material matter and it is alleged, that this was done after the record was made, by some unauthorized person, such alteration constitutes no part of the record, and an enquiry may be made into the genuineness of such altered record, and it may be proven by parol, that such alteration was thus made by one not authorized to make it. This is not controverting the absolute verity of the record, but simply enquiring as to what really constitutes the record. If this were not allowed, the absolute verity attributed to a record could be used to give sanction to a forgery or to a fraudulent erasure of the record. *Id.*
4. When a record is thus to be restored to its original and true form, the proper mode of doing it is by a motion, which can be made even after the case, in which the record is made, has been removed to the Appellate Court; but such motion can only be made in the court below, in which the record was made up. *Id.*
5. Though a record appears to have been interlined or erased, its verity can not be assailed incidentally or in any other court, but only in the court where the record is made, and then only when it is directly called in question by a motion to correct it. *Id.*
6. When a record has been thus restored to its original and true form, the record will in all other proceedings be taken in its corrected and not in its falsified form. *Id.*

See *Appellate Court*, 2-5; *Pl. & Pr.*, 9.

REHEARING. See *Chy. Pl. & Pr.*, 1.

REPEAL OF STATUTES. See *Writ of Prohibition*, 4.

REVIVAL OF SUITS. See *Unlawful Entry and Detainer*, 3.

ROADS. See *Eminent Domain*.

SALES IN GROSS. See *Vendors and Vendees*, 1-5, 16-19.

SECURITIES. See *Mortgage*, 1-8.

SET-OFF. See *Taxes*, 1.

SHERIFF. See *Taxes*, 1.

SPECIAL JUDGE. See *Appellate Court*, 11.

SPECIFIC EXECUTION. See *Vendors and Vendees*, 6, 7; *Demurrer*, 6, 7, 8.

STATEMENTS. See *Insurance*, 12-18.

STATUTE OF LIMITATIONS.

1. The statute of limitations does not commence to run in favor of an occupant of land, while the title thereto is vested in the State. But the statute does commence to run in favor of such occupant against the grantee of the State from the date of the grant of the land so occupied. *Hall v. Webb*, 318.
2. Where land had been granted by the State, and an adversary possession had commenced to run against the true owner, and subsequently such land became forfeited to the State under the delinquent land laws, such possession would not be adversary to the State or her grantee after the forfeiture, except from the time the land was re-granted or sold by the State. *Id.*
3. The act of the Legislature of this State, passed February 6, 1873, in so far as it attempts, in actions for the recovery of land, to exclude from the time fixed as the bar in such actions by the statute of limitations, the period from the 28th day of February, 1865, to the date of the passage of said act, is unconstitutional and inoperative as to actions which had become barred before the passage of said act. *Id.*
4. Since the disuse of special replications in equity practice, if a bill in equity shows on its face that the relief it prays for is barred by the lapse of time, advantage may be taken of such bar by demurrer as well as by plea. *Jackson v. Hull*, 601.
5. Where a suit is brought by a lien-creditor against his debtor to subject the lands of the latter to the payment of his debt, and during the pendency of such suit another lien-creditor of such debtor, by leave of the court, files his petition in said suit and is made a party thereto, and process is ordered against the defend-

STATUTE OF LIMITATIONS (*continued*).

ant to answer such petition, which is not issued at once but is subsequently issued and duly served on the defendant. **HELD :**

That in such case the statute of limitations ceases to run against the debt of such petitioner at the time he files his petition and not at the time, when the process to answer it is served on the defendant. *Id.*

See *Principal and Surety* 1 ; *Partners and Partnership*, 4 ; *Deeds*, 6, 7 ; *Mortgage*, 6.

STAY OF PROCEEDINGS. See *Chy. Pl. & Pr.*, 12.

STOCKS AND STOCKHOLDERS. See *Corporations*, 1, 2.

TAXES.

A tax-payer will not be allowed to offset the sheriff's personal indebtedness to him against the taxes due the State, county or district. *Humphrey v Patton*, 220.

TIME. See *Demurrer*, 8 ; *Cr. Pl. & Pr.*, 6.

TITLE. See *Abandonment*, 1, 2, 3, 4.

TOLLS. See *Negligence*, 5.

TORT. See *Unlawful Entry and Detainer*, 2.

TRUSTS AND TRUSTEES.

Real estate is, by deed, conveyed to a trustee for the sole use of Ruth, the wife of N., with power to said trustee, upon the written request of said Ruth attested by a credible witness, to sell and convey the same in fee simple to any person she may designate by writing as aforesaid. The trustee in pursuance of such written request by Ruth conveys said real estate by trust-deed to secure the payment of a note executed by said Ruth. **HELD :**

The said conveyance by the trustee under said power operated as a grant from the grantors in the deed creating the use and conferring the power and not as a grant from the usee, the said Ruth ; and consequently, said conveyance by the trustee under said power, operated as a valid conveyance of the *corpus* of said real estate, although neither the said Ruth nor her husband was a party thereto, and the husband did not unite in said written request. *Norvell v. Hedrick*, 523.

See *Acknowledgment of Deeds*, 1 ; *Parties* 4, 5, 6 ; *Widows*, 1 ; *Chy. Pl. & Pr.*, 6, 7 ; *Vendors and Vendees*, 10, 11, 12.

UNLAWFUL ENTRY AND DETAINER.

1. A motion to quash a summons in unlawful entry and detainer, which summons required the defendants "to appear before the president and justices of our county court for the county of Jackson on the first day of the April term, 1880," was properly overruled, as the defendants were presumed to know at what place in the county the said court would be held. *Cunningham v. Sayre*, 440.
2. It is regular and proper to try an action of tort against defendants, who have pleaded, without waiting for other defendants to appear and plead. *Id.*
3. Under section 2 of chapter 127 of the Code, where pending an action of unlawful entry and detainer the plaintiff dies, the action may be revived in the name of his heirs at law or devisees. *Id.*

See *Abandonment*, 1, 2, 3, 4.

USURY.

1. The plea of usury is a defense personal to the debtor, therefore in his lifetime his creditor cannot plead it to defeat the claim of another creditor in whole or in part. *Lee v. Feamster*, 108.
2. Where a creditor is secured by a second deed of trust on the same property, he has but the equity of redemption and cannot plead usury against a creditor secured under the first trust-deed. *Id.*
3. Where usurious interest has been paid and the transaction closed, the borrower may recover back from the lender the excess so paid beyond the legal rate, in an action of *assumpsit* for money had and received; but if the debt or any part of it, on which such usurious interest has been paid, remains unpaid, a court of equity in stating the account between the parties will credit upon the principal of such unpaid part whatever usurious interest has been paid, and give the lender a decree for his debt with legal interest only. *Norvell v. Hedrick*, 523.

VENDORS AND VENDEES.

1. If the vendor agrees in writing to convey or by deed does convey to his vendee for a specific price, a tract of land described by metes and bounds "as containing a specified number of acres more or less," it is a sale in gross and not by the acre and there is no ambiguity in the written contract or deed on this point, though the price named be an exact multiple of the number of acres named. The case of *Besen v. Humphreys*, 75 Va. p. 196 disapproved, and the 15th syllabus in *Cristip, Guardian, v. Cain*, 18 W. Va. p. 441 approved. *Depue v. Sergeant*, 326.
2. When a bill is filed to enforce a vendor's lien, and the answer asks an abatement of the price on account of a deficiency in the

VENDORS AND VENDEES (*continued*).

quantity of the land, because of fraud in the vendor in misrepresenting in the deed the quantity of the land, or because the land was sold by the acre and not in gross, such answer in either case alleges no new matter, which constitutes a claim for affirmative relief within the meaning of § 35 of ch. 125 of Code of West Virginia; but presents simply a defense to the plaintiff's demand, and therefore the court should not permit a special replication to such answer to be filed, but only a general replication. *Id.* 327.

3. If, on the hearing of such a case when the answer claimed an abatement because the contract was for a sale by the acre the evidence shows, that the contract was in writing, and that it was a sale in gross, but that the defendant is entitled to an abatement because of the fraud of the plaintiff in misrepresenting the quantity of the land in the tract sold, the court ought to permit the defendant to withdraw his answer and file another corresponding with the facts proven; but if the plaintiff replies generally to this answer, the court should allow the parties time to take testimony on the new issue thus made up. *Id.*
4. Where the contract of sale is in writing and unambiguous, no parol evidence of any character can be received to prove, that the parties intended a sale by the acre if on the face of the contract it is a sale in gross. But, though the contract be in writing and unambiguous and is a sale in gross yet, if the pleadings show that the issue between them is, whether the vendor did misrepresent the number of acres in the land by the contract, to the prejudice of the vendee, any sort of parol evidence which tends to establish such fraud may be received even though it tends to contradict the written contract, as by showing that the land was considered by the parties as sold by the acre. *Id.*
5. The general rule is, that if in case of a deficiency in quantity in the sale of land, the vendee for any cause is entitled to an abatement of the price, this abatement should be at the rate of the average value per acre of the entire tract sold. *Id.*
6. Where a vendee, who before the beginning of the late civil war, and during the continuance thereof, resided in Madison county, Virginia, east of the Allegheny mountains, purchased a tract of land before the commencement of said war, situated in Fayette county, Virginia, from his vendor who then resided, and who during said war continued to reside, in the county of Kanawha, Virginia, partly for cash, and partly upon credit, payable in instalments, which did not become due, until after the proclamation of the president of the United States, dated the 16th day of August, 1861, declaring certain States, and parts of States, in a state of insurrection against the government of the United States, the right of the said vendor to a specific execution of said

VENDORS AND VENDEES (*continued*).

contract from the 16th day of August, 1861, to the end of said war, was suspended ; and that during the same period, it became and was unlawful for such vendee to enter the military lines of the United States to pay said instalments as they became payable. *Grinnan v. Edwards*, 347.

7. Where said vendor during said war, and while said vendee continued to reside in said county of Madison and within the military lines of the Confederate States, instituted his suit in chancery in the circuit court of Kanawha county, then a part of West Virginia, against said vendee to sell said land to pay said unpaid purchase-money, alleging in said bill that all of the defendants therein were non-residents of this State, and that they resided in the State of Virginia, east of the Blue Ridge ; and where none of the defendants in said suit appeared thereto, or was served with process thereon, but the bill was taken for confessed against them upon an order of publication only, and where the land was sold under a decree in said cause, rendered upon said bill so taken for confessed, and was purchased by said vendor. **Held :** That such decree is absolutely void ; and in a suit brought by such vendee against said vendor, to enforce the specific execution of the contract for the sale of said land will be treated as a nullity. *Id.*
8. Where during the late civil war defendants, who resided within the military lines of the Confederate States, were sued in the courts of this State and within the military lines of the United States ; and where such defendants were by the laws of the United States or the laws of this State, prohibited from appearing or remaining in this State, and thereby prevented from making defense to such suit, such prohibition will be treated as a denial of their right to make such defense, and equivalent to striking out their appearance and defense after the same had been in fact made. *Id.*, 348.
9. The said vendor having become the purchaser of said land under such decree, and subsequently conveyed the same to other parties, neither he nor they *thereby* acquired any valid title or claim to said land. *Id.*
10. The said vendee having purchased the said land for himself and also as trustee for other parties whose interest appears upon the face of the title-bond executed to him by said vendor, for the conveyance of the legal title thereto, such beneficiaries were necessary parties in any suit instituted by said vendor to sell the said land to satisfy said unpaid purchase-money ; and not having been made parties to such suit, they are not bound by the decree rendered therein. *Id.*
11. The said vendor having purchased said land under the said decree, for a sum largely in excess of the amount therein decreed to

VENDORS AND VENDEES (*continued*).

- him, and never having paid the same, as required by said decree, would, in case said decree be held valid, hold the same as trustee for the use of said beneficiaries, according to their several interests therein. *Id.*
12. In such a case, the said vendee and said beneficiaries, have the right to maintain an original bill against the said vendor, and his said alienees to enforce the specific execution of said contract, notwithstanding said decree. *Id.*
13. A court of equity will not decree a cancellation of a contract for the sale of land between vendor and vendee, in the absence of mistake, accident or fraud, where the contract is not illegal or contrary to public policy, merely on the ground of deficiency in the quantity of land sold, where compensation for such deficiency, can be made to such vendee. *Anderson v. Snyder*, 632.
14. Where a vendee has conveyed to the vendor certain lands, in exchange for other lands sold to such vendee and the vendor has conveyed the lands so conveyed to him, to a third party, and he is unable to reconvey said lands to such vendee, it is error in the court to decree a cancellation of said deed, in a suit brought by said vendee against said vendor and his alienees of said land, upon the consent of said vendor, even where his said alienees fail to appear, in the circuit court or in this Court to resist the same. *Id.*
15. If it appear to this Court that such decree of cancellation so entered by the consent of such vendor, will be detrimental to the interests of any of the defendants, it will, in accordance with its ninth rule of practice "consider the whole record as before it and will review the proceedings in whole or in part, in the same manner, as it would do, were such appellee to bring the same before it by appeal, unless such error shall be waived by such appellee." *Id.*
16. If the vendor by his written contract agrees to convey for a specified price, a tract of land described by metes and bounds or otherwise, with the words added, containing a specified number of acres, or that number of acres "more or less," this on the face of such contract is a contract not by the acre, but in gross and without any implied warranty of the quantity, and not being ambiguous cannot be explained, modified or altered by any kind of parol testimony. And in such a case, if there was no fraud in either party, a court of equity will allow no abatement or compensation on account of a deficiency in the quantity of said land. *Id.*
17. Although the sale be in gross, and not by the acre, if the vendor, to induce the vendee to purchase, falsely represents to him that the land contains a specified number of acres, or that number "more or less," and the vendee relying on the truth of such

VENDORS AND VENDEES (*continued*).

representation, is thereby induced to purchase the same as containing about that number of acres, at a price he would not otherwise have given for it, such representation even if innocently made, may amount to an implied warranty of the number of acres, and the vendor may be compelled to account to the vendee for a deficiency in the number of acres. *Id.*

18. If such false representations of such vendor be unqualified, as made upon his personal knowledge, and the vendee believe and rely on them as true, which he has a right to do, it ought *prima facie* to be regarded, that the vendee was induced to pay, or to agree to pay the price named in the contract because of the statement contained in it of the number of acres in the tract of land sold, and the vendor must in the absence of all proof, be regarded as guilty of a fraud upon the vendee, and for this reason a court of equity will require the vendor to make to the vendee an abatement from his purchase-money if not paid, or if paid, compensation for such deficiency. *Id.* 633.
19. The measure of such compensation or abatement is the contract price by the acre, of the land sold, if the same can be ascertained, and if not ascertainable, then the average value by the acre of the land sold, must be taken as the measure of such compensation or abatement. *Id.*
20. Sections 22 and 23 of chapter 130 of the Code of West Virginia made no material change in the common law rule of evidence as to husband and wife giving evidence, for or against each other, in a cause in which they are parties, except in an action or suit between husband and wife. *Rose & Co. v. Brown*, 10 W. Va. 122 and *Hill et ux. v. Proctor*, 11 W. Va. 59. *Id.*
21. In the fifth exception to section 23 of chapter 130 of the Code of West Virginia, the words in "*an action or suit between husband and wife*," are to be construed as synonymous with the words, "*a controversy between husband and wife*," and therefore neither the husband or wife was a competent witness for or against each other in a controversy between them, and a *third* party in any action, suit or other proceeding, although they may severally stand therein, as plaintiff and defendant. *Id.*
22. On a contract for the sale of land the vendee is entitled to a general warranty deed, where the vendor is seized of the land in his own right, unless the contrary is agreed upon; but if the vendor be an executor, trustee or commissioner of the court, the vendee is entitled to a deed with special warranty only. *Tavenner v. Barrett*, 657.
23. Where a party purchases land of a special commissioner of the court, and his purchase is confirmed, but before a deed is made to him, he executes a power of attorney to the special commissioner authorizing him to sell this land for him, and the special

VENDORS AND VENDEES (*continued*).

commissioner does so and signs a written contract agreeing to convey this land to the purchaser on the payment of the whole of the purchase-money, signing the contract as special commissioner and attorney in fact of the first purchaser. **HELD :**

The true meaning of such contract is, that the sub-purchaser takes a deed from the special commissioner with the assent of the first purchaser, and therefore he is in such case only entitled to a deed with special warranty of title. *Id.*

VENDOR'S LIEN. See *Chy. Pl. & Pr.*, 6, 7; *Vendors and Vendees*, 2.

VERDICT. See *Pl. & Pr.*, 1, 8, 10, 16, 17, 20, 21, 22.

WAIVER. See *Chy. Pl. & Pr.*, 4, 8.

WIDOWS.

1. A husband conveys real estate to a trustee to secure the payment of a debt and the wife unites in such conveyance; after the death of her husband, a creditor's bill is filed to subject the real estate of said husband to the payment of his debts and the said trust property is sold under a decree in said suit. **HELD :**

The widow is not entitled to dower in the property so conveyed or the proceeds thereof, unless there is a surplus after paying said trust debt and such costs as are properly chargeable to the fund arising from the sale of the property so conveyed. *Reinhardt v. Reinhardt*, 76.

2. A husband dies seized of real estate and owing debts exceeding the value of all his estate, personal and real, leaving a widow and infant children. The widow as guardian of said children files a declaration of homestead on a part of said real estate after the death of the husband. **HELD :**

That the widow and children took said real estate subject to the liens and equities against it in the hands of the husband, and said declaration does not exempt it, or any part of it, from the debts contracted by the husband and due from his estate. *Id.*

See *Wills*, 1-4.

WILLS.

1. Upon a bill in chancery to contest the validity of a will, which has been regularly admitted to probate, the functions of the suit are exhausted when that question is decided; and if the will is declared invalid and null, it is not competent for the court to proceed in that cause further, as for instance to establish another will, which had not been offered for probate, though this was also asked in the bill by the plaintiffs, the devisees in such alleged will, and though the bill alleged, that this other will had

WILLS (*continued*).

been improperly destroyed. And therefore it is not necessary for the plaintiffs in such first bill to offer any proof of the execution of such first will, before the court directs an issue of *devisavit vel non* as to the will probated. *Dower v. Church*, 23.

2. Upon a motion to set aside a verdict on such an issue of *devisavit vel non*, on the ground that the verdict is contrary to the evidence, the court overrules the motion and makes a decree according to the verdict, and the party moving files a bill of exceptions to the refusal of the court to set aside the verdict, and all the evidence is set out in the bill of exceptions, and it is all parol evidence, the Appellate Court will reject all of the evidence of the exceptors, which is in conflict with that of the other party; and if upon the evidence of the appellee giving it full force and effect, and of that of the appellant not in conflict with it, the case is in favor of the appellee, the decree will be affirmed. *Id.*
3. If in such a case the plaintiffs in the chancery suit are the devisees under a former will of the testator seeking to set aside a later will, which had been admitted to probate and which revoked the will under which the plaintiffs claimed, the heirs of the decedent, should be made parties defendants as well as those parties, that claim under the will of the decedent, which had been probated. *Id.*
4. But if in such a case the heirs of the intestate are not made parties, and no objection is made in the court below till after the issue of *devisavit vel non* has been made up and tried, and the jury has returned a verdict against the will, which has been probated those claiming under this will cannot then be heard to object to the entering of a decree in accordance with the verdict, because the heirs had not been made parties. *Id.*
5. On the trial of such an issue witnesses, who have stated the facts seen by them shortly prior or subsequent to the making of the paper by the intestate claimed to be his will, which indicate the capacity or incapacity of the decedent to make a will, may give their opinion to the jury based on such facts as to whether the testator was or was not competent to transact business of importance. For though the fact, that he was not competent to transact such business, would not prove him incompetent to make a will, yet it is evidence, which in connection with the facts proven and other evidence might tend to show incompetency, and is proper to be considered by the jury in trying such an issue. *Id.*, 24.

A testator used the following language in his will: "I bequeath unto my wife, Lucy, all the balance of my estate, both real and personal, to have and to hold as long as she remains my widow. At her death I direct, that my estate shall be divided as follows :

WILLS (*continued*).

Unto my sons Alvin and Rush I will and bequeath the farmhouse and lot now in the occupancy of Wm. O. Protzman; and the residue of my estate I direct to be equally divided between my daughters, (naming them) "and my two sons Alvin and Rush. * * I hereby constitute and appoint my wife, Lucy, my executrix with full power to sell and transfer any of my real estate that she may deem proper, and to do and perform everything necessary to be done." HELD:

7. The widow took a life-estate only in the real and personal property. *John v. Barnes*, 498.
8. General power was conferred upon her as executrix to sell and convey in fee simple any of the real estate. *Id.*
9. The purchasers were not bound to look to the application of the purchase-money. *Id.*
10. The executrix under said power having sold and conveyed a tract of two hundred and forty-one and one-half acres of land, a suit brought after her death to have partition among the devisees under the will was properly dismissed. *Id.*

WRIT OF ERROR.

A writ of error and *supersedeas* having been dismissed because of the failure of the plaintiff in error to give a new bond with good and sufficient security, the sureties in the first bond being insolvent, the plaintiff in error cannot after such dismissal of his writ of error be awarded a writ of error without *supersedeas* on giving the bond required by law, and if such writ of error has been granted it will be dismissed as improvidently awarded. *Casanova v. Kreusch*, 720.

See *Writ of Prohibition*, 3; *Appellate Court*, 3, 4, 5.

WRIT OF PROHIBITION.

1. Some of the general principles of law stated, governing writs of prohibition, their uses and application. See opinion. *McConiha v. Guthrie*, 134.
2. The rule is well established, that where the inferior court has originally jurisdiction of the cause, the writ of prohibition will lie only where such court, during the proceedings or in the conduct of the trial, clearly exceeds its legitimate powers in some collateral matter arising in the cause over which it has no authority; but unless it has so exceeded its authority, on an application for such writ the court above will not enquire whether it has decided right or not. *Id.*
3. The inferior court having general jurisdiction of the subject matter, it has the right and authority to determine whether or not it has acquired jurisdiction of the particular case by a sufficient service of process or notice upon the defendant. And any error

WRIT OF PROHIBITION (*continued*).

committed in that regard will not be an excess or abuse of its jurisdiction, but an error in adjudicating a matter within its legitimate authority, and the remedy for such error is by writ of error or *certiorari*, and not by writ of prohibition. *Id.*

4. The courts do not favor the repeal of a statute by implication; and in construing a prior and a subsequent statute, relating to the same subject matter, the latter will not be held to be a repeal of the former, unless the repugnancy between them is irreconcilable; and consequently, where the prior statute is general in its terms and prohibits the taking of a certain species of property in any case whatever, and the subsequent statute is limited or special in its terms and authorizes the taking of such property in certain described localities only, the latter will be held to be a limitation or qualification of the former and the prohibition will apply to all cases except to the localities thus specified in the subsequent statute; and an express repeal of the qualifying statute will restore the prohibition in the general statute to its original force and it will then operate as though the qualifying statute had never existed. *Id.* 136.
5. Section 5 of chapter 52 of the Code, as amended by chapter 88 of the acts of 1870, is in force in this State; and therefore, if a judge of the circuit court, having general jurisdiction of proceedings to condemn lands for railroad purposes, on the application of a railroad company entertains such proceedings and appoints commissioners to view and ascertain the compensation to be paid for lands, on which there are dwelling-houses of the owners, without the consent of such owners, and makes an order that such railroad company may, upon paying into court the compensation ascertained by such commissioners, take such lands for the use of its railroad, without excepting such houses and a space within twenty feet of each of them, as provided in said section 5, he thereby exceeds his legitimate powers, and a writ of prohibition will be awarded by this Court, on the petition of such owners to prohibit him from proceeding therein and said railroad company from invading or taking such houses or the land within twenty feet of any of them. *Id.*

WRIT OF UNLAWFUL ENTRY AND DETAINER. See *Abandonment*, 1, 2, 3, 4.

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